DOCKET

No. 07-343 *** CAPITAL CASE ***
Title: Patrick Kennedy, Petitioner
v.
Louisiana
Docketed: September 13, 2007
Lower Ct: Supreme Court of Louisiana
Case Nos.: (05-KA-1981)
Decision Date: May 22, 2007
Rehearing Denied: June 29, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 11 2007	Petition for a writ of certiorari filed. (Response due October 15, 2007)
Oct 4 2007	Order extending time to file response to petition to and including November 14, 2007.
Nov 14 2007	Brief amici curiae of National Association of Social Workers, et al. filed.
Nov 14 2007	Brief of respondent Louisiana in opposition filed.
Nov 14 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Nov 14 2007	Motion for leave to file amici brief filed by Louisiana Public Defender Offices in Parishes Impacted by Hurricanes Katrina and Rita.
Nov 27 2007	Reply of petitioner Patrick Kennedy filed.
Nov 28 2007	DISTRIBUTED for Conference of January 4, 2008.
Dec 13 2007	Letter of December 13, 2007, from counsel for petitioner received. (Distributed)
Jan 4 2008	Motion for leave to file amici brief filed by Louisiana Public Defender Offices in Parishes Impacted by Hurricanes Katrina and Rita GRANTED.
Jan 4 2008	Petition GRANTED. The brief of petitioner is to be filed on or before Thursday, February 14, 2008. The brief of respondent is to be filed on or before Wednesday, March 12, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Jan 30 2008	SET FOR ARGUMENT ON Wednesday, April 16, 2008.
Feb 12 2008	Consent to the filing of amicus briefs in support of either party, or neither party, received from counsel for the petitioner.
Feb 14 2008	Joint appendix filed. (Statement of costs received)
Feb 14 2008	Brief of petitioner Patrick Kennedy filed.
Feb 15 2008	Consent to the filing of amicus briefs in support of either party, or neither party, received from counsel for the respondent.
Feb 15 2008	Brief amici curiae of Louisiana Association of Criminal Defense Lawyers, et al. filed. (Distributed)
Feb 20 2008	Brief amicus curiae of American Civil Liberties Union, et al. filed.
Feb 21 2008	Brief amici curiae of Leading British Law Associations, et al. filed.
Feb 21 2008	Brief amici curiae of National Association of Social Workers, et al. filed.
Feb 21 2008	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Mar 5 2008	CIRCULATED.
Mar 12 2008	Brief of respondent Louisiana filed. (Distributed)
Mar 12 2008	Record received from the Supreme Court of Louisiana. (4 boxes)
Mar 19 2008	Brief amici curiae of Missouri Governor Matt Blunt, and Members of the Missouri

	General Assembly filed. (Distributed)
Mar 19 2008	Brief amici curiae of Texas, et al. filed. (Distributed)
Mar 19 2008	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Mar 31 2008	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
Apr 4 2008	Reply of petitioner Patrick Kennedy filed. (Distributed)
Apr 14 2008	Letter from counsel for petitioner received and distributed.
Apr 16 2008	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. For respondent: Juliet L. Clark, Assistant District Attorney, Gretna, LA; and R. Ted Cruz, Solicitor General, Austin, Tex. (for Texas, et al., as amici curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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No. 07-___ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari
to the Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the crime of rape of a child with the death penalty.

2. If so, whether Louisiana's capital rape statute violates the Eighth Amendment insofar as it fails genuinely to narrow the class of such offenders eligible for the death penalty.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Patrick Kennedy respectfully petitions for a writ of certiorari to the Louisiana Supreme Court in *State v. Kennedy*, No. 05-KA-1981.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court is bifurcated. The first part (App. 1a-65a) and the dissent (App. 133a-134a) are reported at 957 So. 2d 757 (La. 2007). The second part (App. 66a-132a) is unreported.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on May 22, 2007. That court denied Petitioner's timely petition for rehearing on June 29, 2007. App. 135a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

At all times relevant to this case, Section 14:42 of the Louisiana Revised Statutes provided in relevant part:

> A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent because it committed under any one or more of the following circumstances:
>
> * * *

(4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

* * *

D. (1) Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.

(2) However, if the victim was under twelve years, as provided by Paragraph (a)(4) of this Section:

(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment may be capital shall apply.

(b) And if the district attorney does not seek a capital verdict, the offender shall be punished by imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

In 2003, the Louisiana Legislature amended subsections (A)(4) and (D)(2) to substitute the phrase "under thirteen years" for the phrase "under twelve years."

STATEMENT

Petitioner Patrick Kennedy is the only person in the United States who is on death row for a non-homicide offense. He has been sentenced to die for the crime of rape – an offense for which no person has been executed in this country for over forty years. A divided Louisiana Supreme Court nonetheless declined to hold that Kennedy's sentence constitutes cruel and unusual punishment, expressly anticipating that after it ruled this Court would "bring its own independent judgment to bear on the Eighth Amendment question" whether capital punishment may be imposed for rape of a child. App. 47a. Petitioner now seeks that review.

1. In 1976, this Court held in a memorandum opinion that the Eighth Amendment prohibited the State of Louisiana from imposing the death penalty for the offense of aggravated rape (there, the rape of two girls, one sixteen and one seventeen) because Louisiana law made such punishment mandatory for the offense. *Selman v. Louisiana*, 428 U.S. 906 (1976), *reversing in part State v. Selman*, 300 So. 2d 467 (La. 1974). The following year, this Court decided *Coker v. Georgia*, 433 U.S. 584 (1977), another case involving the rape of a sixteen-year-old. There, this Court held that regardless of whether state law makes capital punishment mandatory or discretionary, it constitutes cruel and unusual punishment for a state to impose the death penalty for the crime of aggravated rape not resulting in death. In response to these decisions, Louisiana and the handful of other states in the country with similar laws ceased seeking death sentences in rape cases.

In 1995, the Louisiana Legislature re-capitalized the crime of aggravated rape for cases in which the victim is less than twelve years old. *See* La. R.S. 14:42. In a pre-enforcement challenge to that statute, the Louisiana Supreme refused to invalidate it. *State v. Wilson*, 685 So. 2d 1063, 1069 (La. 1996). This Court denied certiorari. But three Justices

took pains to emphasize this Court's lack of jurisdiction and that its decision to deny a petition for writ of certiorari "does not in any sense constitute a ruling on the merits of the case." *Bethley v. Louisiana,* 520 U.S. 1259, 1259 (1997) (Stevens, J., joined by Ginsburg and Breyer, JJ., respecting the denial of certiorari).

2. Petitioner Patrick Kennedy is an African American man who is forty-three years old. Although he has never been pronounced mentally retarded, his IQ has been measured at 70, which resides in the mentally retarded range, and he has only an eighth-grade education. Prior to the events at issue here, his only criminal convictions were for issuing five worthless checks between 1987 and 1992.

At 9:18 in the morning on March 2, 1988, petitioner called 911 to report that his eight-year-old stepdaughter, L.H., had just been raped. Petitioner told the 911 operator that after letting L.H. go play in the garage, he had heard loud screaming and ran to discover her in the house's side yard. He told the operator that L.H. said that two teenage boys from the neighborhood had dragged her into the yard from the garage and forcibly raped her. Petitioner added that he had seen one of the boys and described him as being about eighteen years old and riding a blue ten-speed bike.

The police arrived shortly thereafter. Petitioner took the officers straight to L.H.'s bedroom, where he explained he had carried her after finding her in the yard. L.H. was bleeding from her vaginal area. She was taken to the hospital and underwent surgery. Although L.H.'s injuries were very serious, a pediatric surgeon was able to repair the damage to her genital area, and two weeks later the physical injuries were fully healed.

During this entire ordeal, and for over several months thereafter, L.H. repeatedly told various investigating officers

and doctors, as well as defense investigators, the same thing that petitioner had told the 911 operator – that two neighborhood boys had raped her. She also gave a highly detailed account of the incident in a three-hour interview with a psychologist and a social worker, describing exactly how the boys had assaulted her and then fled on a bike. App. 10a-11a.

The police quickly uncovered evidence that supported L.H.'s allegations. Within two days of the rape, they found a blue bicycle in tall grass behind a nearby apartment that was the same type as the one that petitioner personally identified the day before as resembling the one ridden by the perpetrators. The bike did not have any gears, the tires were flat, and it was covered in spider webs. The police also found a black shirt matching the one that L.H. had said one perpetrator wore. Investigators linked both of these items to Devon Oatis – a large, tall black teenager who lived in the neighborhood and matched L.H.'s general physical description of the lead rapist. When officers interviewed Oatis, he lied to them about his whereabouts on March 2, and he never subsequently provided a verifiable alibi. The police nonetheless decided to rule out Oatis as a suspect because they thought his bicycle appeared inoperable and because he appeared "heavy set," whereas L.H. had described her attacker as "muscular." App. 8a-10a.

The police increasingly turned their sights toward petitioner. As is often the case in child abuse investigations, the police had no direct evidence to substantiate their suspicions. But they interpreted circumstantial evidence at the house to indicate that the rape had occurred in L.H.'s bedroom and that petitioner might have attempted to cover this up by turning over the mattress pad. A dispatcher at petitioner's employer also told the police that on the morning of the rape, petitioner had called, sounding nervous, to say that he would not be coming to work that day because his daughter had "become a lady." And the owner of a carpet cleaning service said that petitioner had called that morning to schedule an

urgent cleaning to remove bloodstains. L.H.'s mother, however, accepted L.H.'s explanation of the rape and denied to state authorities that petitioner could have abused L.H.

In mid-March, the State arrested petitioner and placed him in jail. Shortly thereafter, on April 7, 1998, the State Division of Child Protection Services removed L.H. from her mother's home. According to the investigating officer, the reason for the removal was that "Mrs. Kennedy believes the story that her daughter tells her about two strangers dragging her from the garage and raping her on the side of their house." Dft. Ex. K, Referral Form, at 4. Social workers explained that the State needed to "protect[] [L.H.] from these negative influences" from her mother and described "treatment" as being necessary because: "allegations of sexual abuse by step-father; mother is denying abuse; child has alleged other perpetrators, however evidence points to step-father." *Id.*, Quarterly Report, June 18, 1998, at 1. The State told Mrs. Kennedy that she could regain custody of her daughter again when she learned to "be objective concerning evidence" of the rape – that is, when she told her daughter and the State that she believed petitioner committed the rape. *Id.* at 2.

Soon thereafter, Mrs. Kennedy began telling L.H. that she thought petitioner was the one who had raped her. She also told L.H. that it would be "okay" to tell people that petitioner had done this. App. 23a. On June 22, 1998, the State returned L.H. to her mother.

Police and social workers continued to monitor L.H.'s home environment. They also required Mrs. Kennedy and L.H. to attend state-sponsored "counseling sessions" overseen by one of the assistant district attorneys assigned to the case. Eventually, L.H. relented. In a December 16, 1999 interview that the Sheriff's Office and the District Attorney's Office coordinated with the Child Advocacy Center -- fully twenty months after the rape – L.H. told the State for the first time that

petitioner was the one who raped her. When pressed over about fifteen minutes for details, L.H. was able to furnish only a few, claiming that petitioner had raped her early in the morning in her bed and that she then had fainted.

3. The State charged petitioner with capital rape and tried him in the judicial district court for Jefferson Parish.[1] During pretrial proceedings, the State offered to take the death penalty off the table in exchange for petitioner pleading guilty. Petitioner steadfastly refused this offer and insisted on his innocence, so the case proceeded to trial.

It was not easy to seat a jury. The trial court dismissed forty-four potential jurors because "they would not consider capital punishment either generally or for an offense of aggravated rape." App. 71a-72a & n.14; *see Witherspoon v. Illinois*, 391 U.S. 510 (1968). But after several days of voir dire, a twelve-person jury willing to sentence someone to death for rape was finally selected.

Despite performing exacting forensic analyses of the blood stains on L.H.'s mattress and elsewhere in her house, as well as investigatory medical tests on L.H. herself, the police never found any "positive evidence" linking petitioner to the rape. App. 14a. Accordingly, the "most important" evidence the prosecution presented at trial was L.H.'s videotaped *ex parte* dialogue at the Child Advocacy Center, supported by her mother's testimony that L.H. also had told her that petitioner committed the rape. *Id.* L.H. took the stand at trial, but she "evidently . . . lost her composure" and was never required to describe the rape to the jury. App. 15a.

Petitioner suggested to the jury that, consistent with L.H.'s initial and repeated claims, Oatis was the true

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[1] This is the same parish in which the trial occurred in *Snyder v. Louisiana*, No. 06-10119 (cert. granted, June 25, 2007), which is currently pending in this Court.

perpetrator. But petitioner was unable to force Oatis to appear in court. Although the trial court, at petitioner's request, issued a subpoena for Oatis, he apparently had fled to California and could not be found. The jury ultimately convicted petitioner of rape.

The case then proceeded to sentencing. Following a lengthy evidentiary hearing, the jury determined that petitioner should be sentenced to death on the basis of two of Louisiana's statutory aggravating factors: (1) "the offender was engaged in the perpetration or attempted perpetration of aggravated rape" and (2) "the victim was under the age of twelve years." App. 60a (quoting La. C.Cr.P. art 905.4(A)(1) & (10)). Summarily rejecting petitioner's arguments that imposing the jury's recommended sentence would violate the Eighth Amendment, the trial court sentenced petitioner to death.

4. The Louisiana Supreme Court affirmed petitioner's conviction, and a majority of that court – adhering to its *Wilson* decision that rejected the pre-enforcement challenge to the State's then-newly minted capital rape law – upheld his sentence. Although this Court held in *Coker* that the Eighth Amendment prohibited imposing the death penalty for rape, the majority distinguished *Coker* on the ground that the sixteen-year-old victim there was an "adult woman" and, therefore, that this Court "has not yet analyzed whether the rape of a child under twelve" is punishable by death. App. 43a & n.28, 48a. Freed from the compass of *Coker*, the majority turned to the two-part test that – in the words of the Louisiana Supreme Court (App. 45a) – a "bare majority" of "the prior Court" (that is, this Court before the appointments of its two "new members") formalized in *Roper v. Simmons*, 543 U.S. 551 (2005). That test requires a court: (1) to consider objective criteria indicating whether imposing the death penalty is cruel and unusual, and then (2) to exercise "independent judgment" concerning "whether the death penalty is a disproportionate punishment" under the circumstances at issue. *Id.* at 564.

In objective terms, the Louisiana Supreme Court acknowledged that petitioner is the only person in the United States on death row for a non-homicide offense; that only five states even have statutes on the books theoretically allowing the death penalty to be imposed for child rape; and that no state since *Coker* – indeed, no state for over forty years – has executed a single person for any kind of rape. App. 48a-49a. But instead of drawing from this evidence the inference that sentencing petitioner to death constitutes cruel and unusual punishment, the majority found that objective factors actually support the constitutionality of petitioner's sentence. The majority asserted that the five states that have capital rape statutes actually embody a "compelling" "trend" – *e.g.*, that "even after the Supreme Court decided in *Coker* that the death penalty for rape of an adult woman was unconstitutional, five states nevertheless have capitalized child rape." App. 55a. In addition, the majority noted that nine states besides those five and the federal government have at least one law on the books allowing capital punishment for a non-homicide offense. App. 52a-55a. Turning to the second prong of *Roper*'s test, the majority predicted, in light of *Coker*'s characterization of rape as "second only to homicide in the harm that it causes," that if this Court "is going to exercise its independent judgment to validate the death penalty for any non-homicide crime, it is going to be child rape." App. 56a.

The Louisiana Supreme Court also rejected petitioner's more limited Eighth Amendment argument that even if some rapes of child victims could be punished with the death penalty, Louisiana's capital rape law does nothing to guide juries in differentiating between child rapes that are deserving of capital punishment and those that are not. The court reasoned that even though two of the applicable aggravating facts that allow a jury to impose a death sentence simply duplicate elements of the child rape statute, the "underlying [child rape] statute itself" performs the constitutionally required narrowing function because only those who rape

victims less than twelve years of age are subject to the death penalty. App. 58a-62a; *see also Wilson*, 685 So. 2d at 1072.

Chief Justice Calogero dissented. He reasoned that *Coker*'s holding – namely, that imposing the death penalty for rape violates the Eighth Amendment because the victim "d[oes] not die" – "retains its force undiminished today not only because the decision set out a bright-line and easily administered rule, but also because the 'abiding conviction' expressed in that decision . . . has served as the wellspring of the Supreme Court's capital jurisprudence over the past thirty years since *Gregg* [*v. Georgia*, 428 U.S. 153 (1976)]." App. 133a-134a (quoting *Coker*, 433 U.S. at 598). Nothing in the "recent legislative enactments" in a handful of states, the dissent continued, warrants a departure from *Coker* and this Court's other rulings prohibiting the death penalty for person-on-person offenses not resulting in the death of the victim. App. 134a.

REASONS FOR GRANTING THE WRIT

"Looming over this case is the potential for [petitioner] to be the first person executed for committing an aggravated rape in which the victim survived since [Louisiana law] was amended in 1995 to allow capital punishment for the rape of a person under the age of twelve." App. 38a. Indeed, if the State were allowed to carry out petitioner's sentence, he would be the first person in this country to be executed for a non-homicide offense in forty-three years – a period that began thirteen years before this Court held in *Coker v. Georgia*, 433 U.S. 584 (1977), that imposing the death penalty for aggravated rape of a sixteen-year-old woman violates the Eighth Amendment's Cruel and Unusual Punishment Clause, and that has continued ever since.[2] A majority of the Louisiana

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[2] The last person executed for rape in this country was Ronald Wolfe, whom the State of Missouri executed on May 8, 1964 by lethal gas. *Executions in the U.S. 1608-2002: The Epsy File Executions by Date* 381

Supreme Court nonetheless declined to invalidate petitioner's sentence, noting that the membership of this Court recently changed and forecasting that "if [this Court] is going to exercise its independent judgment to validate the death penalty for any non-homicide crime, it is going to be child rape." App. 56a; *see also* App. 45a.

This predictive, anti-precedential judgment cries out for this Court's review. It flouts the overwhelming national consensus that capital punishment is an inappropriate penalty for any kind of rape. Forty-five states ban such punishment, and prosecutors and juries in the remaining five states – with the sole exception of this single case – refuse to impose it. The Louisiana Supreme Court's decision also contravenes this Court's holding in *Coker*, as well as other decisions ruling that at least in the context of person-on-person violent crime,[3] the death penalty is constitutionally excessive punishment for crimes that do not result in the victim's death. And if that were not enough, the Louisiana Supreme Court's decision conflicts with decisions from every other state court of last resort to consider this or any similar issue.

This case does not have any vehicle problems; it stands in the ideal procedural posture for this Court's review and actually highlights the distressing realities attendant to extending the death penalty into the realm of child rape. There would be no benefit from further percolation. This Court should grant review to settle this enormously important matter.

(2007). The last execution in the United States for any non-homicide offense occurred on September 4, 1964, when Alabama electrocuted James Coburn for robbery. *Id.*

[3] This phrasing leaves aside "*sui generis*" crimes such as treason and espionage, *see* App. 134a (Calogero, C.J., dissenting), as well as offenses such as air piracy and the federal "drug kingpin" law that inherently involve a reckless disregard for human life on a large scale.

I. This Court Should Grant Review To Make Clear That The Eighth Amendment Bars Imposing the Death Penalty for Child Rape.

A. The Louisiana Supreme Court's Decision Contravenes This Court's Precedent.

In *Coker v. Georgia,* 433 U.S. 584 (1977), this Court considered whether imposing the death penalty upon a thrice-convicted rapist violated the Eighth Amendment. The defendant had raped a sixteen-year-old at knifepoint with her husband tied up and watching in the bathroom, and then abducted her from her home. Seven members of this Court agreed that the defendant's death sentence constituted cruel and unusual punishment. Justice White's plurality opinion began by noting that, in response to this Court's decision in *Furman v. Georgia,* 408 U.S. 238 (1972), which required states to revamp their death penalty laws, only six had enacted statutes making any form of non-homicidal rape a capital offense *Id.* at 594-95. The plurality then explained that:

> [T]he legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.
>
> . . . .
>
> Rape is without a doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not involve the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape

> victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond all repair. We have the abiding conviction that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life.

Id. at 597-98 (internal quotations, citations and footnote omitted).

It is readily apparent that the Louisiana Supreme Court's decision allowing the imposition of capital punishment for the crime of child rape cannot be squared with *Coker*. The Louisiana Supreme Court asserted that *Coker* is distinguishable from this case because the victim here was younger and "[c]hildren are a class of people that need special protection." App. 43a, 48a, 57a. But *Coker* leaves no room for such hairsplitting. The *Coker* Court considered all legislative variations of rape and forbade capital punishment for that offense for the simple reason that the crime "does not take [a] human life." 433 U.S. at 598 (plurality opinion); *see also id.* at 599 (emphasizing that even when rape is aggravated the crime does "not involv[e] the taking of life"); *id.* at 621 (Burger, C.J., dissenting) ("The clear implication of today's holding appears to be that the death penalty may properly be imposed only as to crimes resulting in the death of the victim.").

This Court has never wavered from that judgment. To the contrary, it has reinforced *Coker* through other decisions holding that the Eighth Amendment prohibits imposing the death penalty for a person-on-person violent crime in which death does not result. *See Enmund v. Florida*, 458 U.S. 782, 797 (1982) (aggravated robbery, even when connected to felony murder, is not punishable by death when defendant "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed"); *Eberheart v. Georgia*, 433 U.S. 917 (1977) (aggravated kidnapping alone

not punishable by death). As the dissent below properly recognized, App. 134a, the Louisiana Supreme Court had no warrant to resist this unbroken line of authority.

But even if the Louisiana Supreme Court were correct that *Coker* and its progeny leave open the possibility that a capital child rape statute might be constitutional if reinforced by objective indicia of national support, it would not matter. In assessing whether imposing capital punishment comports with objective indicia of legitimacy, this Court recently made clear that courts should look to (1) the number of states that have statutes allowing the death penalty for the offense at issue; (2) the "[]frequency of its use even where it remains on the books"; and (3) the direction of any change on the issue. *Roper v. Simmons*, 543 U.S. 551, 567 (2005); *Atkins v. Virginia*, 536 U.S. 304, 313-16 (2002). In *Roper* and *Atkins*, this Court held that the Eighth Amendment barred executing juvenile and mentally retarded offenders, respectively, where twenty states allowed such punishment; those laws were rarely enforced; and the number of such laws was decreasing. *Roper*, 543 U.S. at 564-67; *Atkins*, 536 U.S. at 314-17; *see also Enmund*, 458 U.S. 792-93 (fact that eight jurisdictions allowed death penalty under circumstances "weigh[ed] on the side of rejecting capital punishment for the crime at issue").

These guideposts confirm that petitioner's sentence cannot stand. Only five states, including Louisiana, currently have statutes on the books authorizing the death penalty for child rape – and none of the other four states authorizes such punishment when, as here, the defendant does not have any prior convictions for rape.[4] What is more, even though these

[4] Those four other states are South Carolina, Oklahoma, Montana, and Texas. *See* S.C. Code Ann. § 16-3-655(c)(1) (2006 Supp.) (child rape when defendant previously has been convicted of sexual battery of a child and jury finds aggravating circumstance beyond defendant's record and age of child); 10 Ok. St. Ann. § 7115(I) (2006 Supp.) (child rape or lewd molestation when defendant previously has been convicted of such an offense);

statutes have been on the books for as many as twelve years, no one besides petitioner in any of these five states – nor any other state over the past forty-three years – has actually received a death sentence for child rape. There are currently over 3300 people on death row in America, and petitioner is the only one who did not commit murder. Death Penalty Information Center, *Facts About the Death Penalty* 2 (2007). Even within Louisiana, petitioner's sentence is an extreme anomaly: the State has initiated over 180 prosecutions for child rape since the 1995 law at issue here went into effect, *see* Dft's La. S. Ct. Sentence Review Mem. at 5-7, and petitioner's case is the only one in which the State has sought and obtained a death sentence. By any objective measure, petitioner's sentence is not only cruel and unusual; it is cruel and unique.

The Louisiana Supreme Court insisted that the situation is actually "more complex" because nine other states and the federal government have statutes allowing capital punishment "for other non-homicide crimes which are far less heinous" than child rape. App. 50a. But this observation is merely makeweight. Those crimes – treason, espionage, and air piracy, aggravated assault by a prisoner, and kidnapping – are so unrelated to the offense at issue here that this Court in *Coker* had no need even to survey states' punishments for them. *See*

Mont. Code Ann. § 45-5-503 (enacted 1997) (child rape when defendant previously has been convicted of same crime); Texas Pen. Code § 12.42 (2007 Supp.) (child rape when defendant has previously served at least a 25-year sentence for the same crime). Because none of these statutes has been invoked to sentence a person to death, no court has considered whether any of them is constitutional. The Louisiana Supreme Court claimed that a Georgia statute, enacted in 1999, also allows child rape to be punished by death. App. 49a. But the Supreme Court of Georgia explained years ago that "[s]tatutory rape" – its term for any kind of rape of a child – "is not a capital crime in Georgia." *Presnell v. State*, 252 S.E.2d 625, 626 (Ga. 1978). The Georgia Legislature's 1999 redrafting of its statutory rape provision did nothing more than clarify an ambiguity in the law's substantive scope. *See State v. Lyons*, 568 S.E.2d 533, 535-36 (Ga. App. 2002).

Coker, 433 U.S. at 592-96; *see also Enmund*, 458 U.S. at 793 & n.15 (rejecting dissent's attempt to enlarge survey beyond the particular "crime at issue"). Nothing has changed in that respect. What is more, none of those jurisdictions has imposed a single death sentence for any of these crimes in over forty years. Consequently, whatever the legal status of these various statutes, they provide no cover for the State here.[5]

The Louisiana Supreme Court also asserted that the direction of change in the realm of child rape is toward allowing the death penalty for this offense. App. 55a. "[E]ven after [this Court's decision] in *Coker*," the court declared, "five states nevertheless have capitalized child rape" in the thirty years "since then." *Id.* But when there is only one single time over a dozen years that a prosecutor and a jury even attempt to implement one of these statutes, it can hardly be said that any "trend" really exists. In any event, whatever movement might be said to exist here is not nearly as forceful as the one this Court found inconsequential in *Coker*. There, this Court noted that "the most marked indication" of society's view of capital punishment for a certain offense at that time was "the legislative response to [its 1972 *Furman* decision]." *Coker*, 433 U.S. at 594 (plurality opinion) (quotation omitted). Over that five-year period since 1972, six states had enacted capital rape statutes (three of which made the death penalty *mandatory* for the offense). *Id.* at 594-95. This Court was unmoved.

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[5] To the extent there is any utility in surveying statutes outside of those establishing punishment for child rape, the national trend of treating sex offenders as mentally ill and civilly committing them for mandatory medical treatment would be far more informative than reviewing how states punish crimes like treason and air piracy. *See generally Kansas v. Crane*, 534 U.S. 407, 414 (2002); *Seling v. Young*, 531 U.S. 250, 264 (2001) (upholding potentially permanent civil commitment).

B. The Louisiana Supreme Court's Decision Conflicts with Decisions from Every Other State Court of Last Resort To Consider This or Any Similar Issue.

Because the Nation displays so little interest in imposing capital punishment for non-homicide offenses, few courts have had any occasion since *Coker* to consider whether the Eighth Amendment permits a state to punish child rape or any other non-homicide offense with the death penalty. But the few courts that have done so all have reached decisions that conflict with the Louisiana Supreme Court's decision here.

In *Buford v. State*, 403 So. 2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163 (1982) & 454 U.S. 1164 (1982), the Florida Supreme Court considered whether a death sentence imposed for violently raping a seven-year-old girl could withstand constitutional scrutiny. The court held that it could not, and it precluded such punishment in no uncertain terms: "The reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Buford*, 403 So. 2d at 951. The Florida Supreme Court recently reaffirmed this view, making it clear that *Buford*'s Eighth Amendment holding rendered child rape no longer a capital offense in Florida. *Welsh v. State*, 850 So. 2d 467, 468 n.1 (Fla. 2003).

The Mississippi Supreme Court also has confronted a post-*Coker* case in which a defendant was sentenced to death for raping a child. *See Leatherwood v. State*, 548 So. 2d 389 (Miss. 1989). At that time, Mississippi's child rape law, read in tandem with its subsequently enacted aggravating circumstances statute, allowed rape to be punished by death when the offender also attempted or intended to kill the victim. But there was no proof of such an attempt or intent in the case.

Accordingly, the Mississippi Supreme Court vacated the sentence without needing to address the constitutionality of sentencing someone to death for a non-homicide rape of a child. *Id.* at 402-03. But two justices wrote separately to emphasize that they would have preferred simply to "hold forthrightly" that Mississippi's child rape law would violate the Eighth Amendment insofar as it allowed the death penalty in the absence of the victim's death. *Id.* at 403 (Robertson, J., concurring). The concurring opinion reasoned that "[t]here is as much chance of the Supreme Court sanctioning death as a penalty for *any* non-fatal rape as the proverbial snowball enjoys in the nether regions." *Id.* at 406 (emphasis in original). The Mississippi Legislature thereafter amended its law to make clear that it precludes capital punishment for any rape in which a victim does not die. *See* Miss. Code § 97-3-65(3).

Two other state courts of last resort have invoked *Coker* to preclude capital punishment for other violent person-on-person offenses in which the victim survives. In *State v. Gardner*, 947 P.2d 630 (Utah 1997), the Utah Supreme Court considered indictments charging two prisoners with capital felonies for committing aggravated assaults against prison guards. The court held that the Eighth Amendment precluded imposing the death penalty because the crime did not result in death:

> The *Coker* holding leaves no room for the conclusion that any rape, even an "inhuman" one involving torture and aggravated battery but not resulting in death, would constitutionally sustain imposition of the death penalty. We may or may not think the Supreme Court reached the right result in so concluding, but we do not see the persuasiveness of an argument that any aggravated assault, no matter how vicious, could be legally more reprehensible than any rape, no matter how brutal. And under *Coker*, no rape, "*with or without*

> *aggravating circumstances*," can constitutionally qualify for the death penalty when death has not resulted.

947 P.2d at 653. In *People v. Hernandez*, 69 P.3d 446, 464-67 (Cal. 2003), the California Supreme Court confronted a similar prosecutorial argument that the state's death penalty statute should be read to "make capital punishment available for those engaged in an *unsuccessful* conspiracy to commit murder." *Id.* at 464. The court refused to read its law this way, reasoning that "a construction of [California's] death penalty law as permitting capital punishment for an offense like conspiracy to commit murder that does not require the actual taking of human life would raise a serious constitutional question." *Id.* at 465. "Although the high court did not expressly hold [in *Coker*] that the Eighth Amendment prohibits capital punishment for *all* crimes not resulting in death, the plurality stressed that the crucial difference between rape and murder is that a rapist 'does not take a human life.'" *Id.* at 464 (quoting *Coker*, 433 U.S. at 598). Other courts in the context of reviewing death sentences for murder have stated that they interpret *Coker* the same way. *See Allen v. Ornoski*, 435 F.3d 946, 951 (9th Cir. 2006) (citing *Coker* for the proposition that "execution for offenses short of murder is unconstitutional"), *cert. denied*, 546 U.S. 1136 (2006); *State v. Black*, 815 S.W.2d 166, 190 (Tenn. 1991) ("While death may be disproportionate *per se* when the offense does not involve the death of the victim, *see, e.g.*, [*Coker*], . . . this is not true when the crime is first-degree murder.").

There is no way to reconcile the Louisiana Supreme Court's decision with the reasoning and holdings in all of these other decisions. This Court is the only institution that can resolve the conflict on this tremendously important issue.

C. This Court Should Resolve This Question Presented Here and Now.

For several reasons, this case provides the ideal opportunity to resolve the constitutionality of imposing capital punishment for the crime of child rape.

1. This case comes to this Court on direct review from a final judgment sentencing a defendant to death. Therefore, in contrast to the only other time in which a case involving Louisiana's current capital rape statute was presented to this Court, this Court unquestionably has jurisdiction. *Compare Bethley v. Louisiana,* 520 U.S. 1259, 1259 (1997) (Stevens, J., joined by Ginsburg and Breyer, JJ., respecting the denial of certiorari) (emphasizing jurisdictional problem present in pre-enforcement challenge to statute and that the denial of certiorari "d[id] not in any sense constitute a ruling on the merits of the case"). This case's procedural posture also means that it is unencumbered by the complexities that typically accompany capital cases on federal habeas review.

2. This case also aptly illustrates two of the primary practical problems that would inevitably plague any extension of the death penalty into the realm of child rape prosecutions. First, this Court noted in *Atkins* that imposing the death penalty is less defensible when the type of prosecution at issue presents "a special risk of wrongful execution." 536 U.S. at 321. The risk of wrongful convictions is especially pronounced in child rape cases, for child testimony is subject to suggestibility in ways that adult testimony is not. *See* Douglas P. Peters, *The Influence of Stress and Arousal on the Child Witness,* in The Suggestibility of Children's Recollections 75 (John Doris, ed. 1991). Children also are uniquely subject to pressures from state social services agencies. As this case vividly demonstrates, such agencies have the power to encourage a child to tell a certain story – indeed, to name a certain perpetrator – on pain of being placed in foster care. *See supra* at 6-7. Finally,

the prosecution, as here, frequently lacks any "positive evidence" linking the defendant to the charged crime. App. 14a. The upshot of these and other evidentiary hydraulics is that child rape prosecutions "are 'he said, she said' cases that ultimately rely on the jury's assessment of the relative credibility of opposing witnesses" and "it is virtually impossible for the jury not to make an occasional credibility mistake." *Ex Parte Thompson,* 153 S.W.3d 416, 422 (Tex. Crim. 2005) (Cochran, J., concurring).

Second, petitioner – as historically almost always has been the case in capital rape prosecutions – is black. The notion of executing people for rape has its roots in the southern antebellum practice of hanging slaves believed to have committed the crime. Stuart Banner, The Death Penalty: An American History 139-42 (2002). White offenders, with few exceptions, were executed only for murder, and "[n]o white rapists are known to have been hanged in the antebellum South." *Id.* at 139; *accord* William J. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982 139-40 (1984). This disparity persisted right up until this country's last execution for rape in 1964: While blacks and whites were executed for murder in almost identical numbers during the mid-twentieth century, over 89% of those executed for rape were black. *See* United States Dep't of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, *Capital Punishment 1930-1967*, at 7 (Aug. 1969). All fourteen rapists Louisiana executed during this period were black. Burk Foster, *Struck by Lightning: Louisiana's Electrocutions for Rape in the Forties and Fifties,* The Angolite, Sept./Oct. 1996, at 36. This Court should pause before condoning a practice so heavily tinged with the scourge of racism.

3. Finally, this case allows this Court to appreciate – and to bring to an end – the "wanton and freakish" nature, *Zant v. Stephens,* 462 U.S. 862, 876 (1983), of Louisiana's latest rendition of capital rape law. After twelve years of operation,

litigators and scholars have compiled a detailed and mature empirical record documenting the law's products and effects, and that evidence is part of the record here. These studies show that numerous offenders who have committed far more vile rapes than that of which the jury convicted petitioner have received life or lesser sentences. Dft's La. S. Ct. Sentence Review Mem. at 9-13. What is more, dozens of offenders during this period who brutally *killed* children have received life or lesser sentences. *Id.* at 38-50. Indeed, the only discernable pattern that Louisiana's capital rape law has generated is that defendants charged with child rape are more likely to plead guilty than before the law was enacted. *See* Angela D. West, *Death as Deterrent or Prosecutorial Tool? Examining the Impact of Louisiana's Child Rape Law,* 13 Crim. Just. Pol'y Rev. 156 (2002). But this reality only serves to highlight the perversity of a system in which only a defendant, such as petitioner, who insists on his innocence and (quite reasonably) demands a trial faces the prospect of "the most severe" of all punishments. *Roper,* 543 U.S. at 568.

II. This Court Should Grant Review To Hold, at the Very Least, That Louisiana's Capital Rape Law Does Not Genuinely Narrow the Class of Offenders Eligible for the Death Penalty.

Even if it were permissible under some circumstances to punish child rape by death, certiorari would be warranted in order to make clear that Louisiana's law nevertheless violates the Eighth Amendment because it does nothing to guide juries in differentiating between child rapes that are deserving of capital punishment and those that are not. In order to prevent states from imposing the death penalty in an arbitrary and capricious manner, it has long been settled that a state's capital punishment law "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens,*

462 U.S. 862, 877 (1983); *accord Arave v. Creech*, 507 U.S. 463, 474 (1993); *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 189-95 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). States must carry out this mandate by requiring juries in capital cases to find some "aggravating circumstance" that distinguishes the defendant from others who also committed the same death-eligible offense. *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994). Accordingly, "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant subject to the death penalty, the circumstance is constitutionally infirm." *Arave*, 507 U.S. at 474.

That is precisely the situation here. Louisiana law classifies rape of a "victim [who] is under the age of twelve years" as one of its forms of aggravated rape. *See* La. R.S. 14:42(A)(4). The only two aggravating facts that the jury found in this case – the only two that Louisiana law required it to find – were (1) that "the offender was engaged in the perpetration or attempted perpetration of aggravated rape" and (2) that "the victim was under the age of twelve years," La. C.Cr.P. art 905.4(A)(1) & (10); *see* App. 60a. The first aggravating factor simply restates the crime of conviction, and the second simply restates one of its elements.

The Louisiana Supreme Court nevertheless upheld petitioner's sentence on the ground that it comported with this Court's holding in *Lowenfeld v. Phelps*, 484 U.S. 231 (1988). *Lowenfeld* makes clear that "the fact that [an] aggravating circumstance duplicate[s] one of the elements of the crime does not make [the] sentence constitutionally infirm." App. 61a (quoting *Lowenfeld*, 484 U.S. at 246). But *Lowenfeld* is limited to situations in which the element or elements of the crime that are duplicated themselves perform the constitutionally required act of "narrowing the class of death-eligible [offenders]." 484

U.S. at 244-46; *see also, e.g., United States v. McCullah*, 76 F.3d 1087, 1108 (10th Cir. 1996) ("Under *Lowenfeld*, an aggravating factor that does not add anything above and beyond the offense is constitutionally permissible" only if "the statute itself narrows the class of death-eligible defendants."); *State v. Young*, 853 P.2d 327, 352 (Utah 1993) (duplicative aggravating circumstance is permissible so long as substantive capital offense "narrows the class of offenders eligible for the death penalty at the guilt phase of the trial"). Here, that is not the case. Given that the death penalty is not a constitutionally available punishment for raping an adult, *see Coker*, 433 U.S. at 598-600, the only fact that makes perpetrators of rape supposedly eligible for the death penalty in the first place is that the victim is a child. And even then, the age of the victim supposedly makes the defendant only minimally eligible for capital punishment – that is, it makes the defendant the least culpable type of offender eligible for the death penalty. Consequently, the fact that the victim of a rape was a child cannot narrow the class of death-eligible offenders.

The only other two state courts of last resort to confront similar situations have enforced *Lowenfeld*'s explicit limitation. In *McConnell v. State*, 102 P.3d 606 (Nev. 2004), the Nevada Supreme Court considered whether an aggravator that essentially duplicated an element of its capital felony murder statute sufficed to satisfy the Eighth Amendment's narrowing requirement. The court held that it did not because, unlike the capital murder statute at issue in *Lowenfeld*, Nevada's capital felony murder statute was not itself "narrow enough that no further narrowing of death eligibility [was] needed once the defendant is convicted." 102 P.3d at 621-22; *see also McConnell v. State*, 107 P.3d 1287, 1289 (Nev. 2005) (en banc) (reaffiming this holding in the course of denying state's petition for rehearing). The Tennessee Supreme Court has reached the same conclusion for the same reasons. *See State v.*

Middlebrooks, 840 S.W.2d 317, 341-46 (Tenn. 1992); *State v. Stout*, 46 S.W.3d 689, 705-06 (Tenn. 2001).[6]

The Louisiana Supreme Court's decision here conflicts with these two decisions, for there is no plausible argument that Louisiana's capital rape law is narrow enough that any defendant convicted of that crime is already more culpable than some other death-eligible offenders.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[6] This Court granted certiorari in *Middlebrooks* but dismissed the case as improvidently granted, presumably because the Tennessee Supreme Court stated after applying federal law to the narrowing issue in the case that the Tennessee Constitution would require the same result. *See Tennessee v. Middlebrooks*, 507 U.S. 1028 (1993), *cert. dismissed as improvidently granted*, 510 U.S. 124 (1993). In this Court, the State of Tennessee did not challenge the Tennessee Supreme Court's holding that when an aggravating fact duplicates an element of an offense, *Lowenfeld* requires state law to "narrow[] the class . . . of death-eligible defendants . . . at the [guilt] stage." 840 S.W.2d at 344. Instead, it argued that *Lowenfeld* did not apply because Tennessee's felony murder aggravator actually narrowed the class of death-eligible offenders at the sentencing stage. *See* Br. for Petitioner 14, *Tennessee v. Middlebrooks* (No. 92-989).

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF LOUISIANA
No. 05-KA-1981

STATE OF LOUISIANA
v.
PATRICK KENNEDY

On Appeal from the Twenty-Fourth Judicial District Court, For the Parish of Jefferson, Honorable Ross LaDart, Judge

VICTORY, J.*

On May 7, 1998, Patrick Kennedy was indicted by a grand jury for the rape of his eight-year-old stepdaughter L. H.[1] on March 2, 1998, in violation of La. R.S. 14:42 (aggravated rape; victim under the age of 12), and the state subsequently gave notice of its intent to seek the death penalty.[2] The district court declared that the defendant was indigent and appointed counsel to represent him on June 23, 1998. After a vigorous pre-trial defense, during which defense

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* Retired Judge Lemmie O. Hightower, assigned as Justice ad hoc, sitting for Associate Justice Jeannette T. Knoll, recused.

[1] In accordance with La. R.S. 46:1844(W)(1)(a), in order to protect the identity of the victim, her name, and her mother's name, will be referred to by the use of initials.

[2] This notice does not appear in the record. Defense counsel filed a bill of particulars on July 24, 1998, in which the defense requested to know whether the state would seek the death penalty. Presumably, this motion was satisfied promptly because defense counsel referred to "this capital case" in its August 26, 1998 motion for a *Bernard* hearing on the admissibility of victim impact evidence.

counsel filed approximately 50 substantive motions and sought 6 supervisory writs,[3] a jury was selected on August 8 and 11–15, 2003. Opening statements commenced immediately after the completion of jury selection and trial continued through August 25, 2003, after which the jury returned a verdict of guilty of aggravated rape. The penalty phase was held on August 26, 2003, and the jury unanimously decided that the defendant should be sentenced to death. On October 2, 2003, the district court denied the defendant's motion for new trial, in which the defense contended that sentencing a defendant to death for an aggravated rape which the victim survives is constitutionally prohibited, and sentenced the defendant to death. The defendant appeals to

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[3] In 99-KK-1850, this Court denied the defendant's application from the district court's refusal to strike aggravating circumstances from the indictment and to prohibit victim impact testimony during the penalty phase, noting that the defendant could re-raise these issues on appeal if convicted (Kimball, J., would grant). In 00-KK-1554, this Court granted the defendant's application to affirm the decision of the court of appeal, which reversed the district court's pre-trial ruling that an adult witness would be permitted to testify at trial under the "lustful disposition exception" that the defendant also raped her three times when she was a child, 16 years before the instant offense, but was never charged or convicted of the crimes (Victory, J., concurred, and Traylor, J., dissented). In a related application, which this Court denied in 00-KK-2428, the defendant sought review of the district court's refusal to schedule an additional pre-trial hearing in which defense counsel could more fully cross-examine this same adult witness. In 02-KK-2088, this Court denied the defendant's application from a determination by the court of appeal that the defendant failed to establish a prima facie case of gender discrimination in the selection of grand jury forepersons in Jefferson Parish (Johnson, J., would grant). In 03-KK-2269, this Court denied the defendant's application from the court of appeal's rejection of the defendant's contention that the legislature violated the ex post facto clause when it authorized the introduction of victim impact testimony during the penalty phase of trials (Calogero, C.J., concurring). In 03-KK-2393, this Court denied the defendant's application from the district court's denial of a defense motion for mistrial during the state's opening statement.

this Court pursuant to La. Const. art. V, § 5(D)(2), assigning 69 errors.

FACTS AND PROCEDURAL HISTORY

It was not disputed that the victim was brutally raped. On the morning of March 2, 1998, the victim was transported by ambulance to Children's Hospital where she was examined in the emergency room. The victim's predominate injury was vaginal with profuse bleeding. Her entire perineum was torn and her rectum protruded into her vagina. Dr. Scott Benton of Children's Hospital testified as an expert in pediatric forensic medicine, that the victim's injuries were the most serious he had seen, within his four years of practice, that resulted from a sexual assault. A pediatric surgeon was called in to repair the damage, which was repaired successfully.[4]

The evidence presented at trial centered around the identity of the defendant as the rapist. Alvin Arguello, chief dispatcher for A. Arpet Moving Co., the defendant's employer, testified that when he arrived for work on the morning of March 2, 1998, which was generally around 6:15 a.m., there was a message from the defendant indicating he would not be available to work that day. The defendant called Arguello again between 6:30 and 7:30 a.m., sounding nervous, to ask him how to get blood out of a white carpet because his stepdaughter[5] had "just become a young lady." Rodney Madere, owner of B&B Carpet Cleaning, testified at trial that the defendant, whom he identified by caller ID, called him at 7:37 a.m. on March 2 to schedule an urgent carpet cleaning job to remove bloodstains. The State

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[4] However, as a result of pain, the victim had to be fed gallons of stool softener through a tube to permit her to begin defecating again.

[5] Arguello testified that he could not remember whether the defendant said his niece or his daughter has "just become a young lady."

introduced a photo of the caller ID box from B&B Carpet Cleaning showing a call from "Kennedy P" at 7:37 on March 2. Lester Theriot, an employee of B&B, testified that Madere called him before 8:00 on the morning of March 2, 1998, and told him to report immediately to the defendant's home, but he did not get there until after he dropped his son off at school, which he routinely did between 8:15 and 8:45. When he arrived, he could not get into the home because the police and an ambulance were present.[6]

At 9:18 in the morning on March 2, 1998, the defendant called 911 to report that his stepdaughter had just been raped. The 911 call was played for the jury.[7] The defendant advised the operator that his daughter was in the garage while he was getting his son ready for school and that he exited the residence after hearing loud screaming. He told the operator that he discovered the victim lying in the side yard between their house and the empty lot next door, and that she told him that two boys grabbed her, pushed her down, pulled her over there, and raped her. When the operator asked if they were white males or black males, the defendant responded, "Ms. May [the victim], was they black or white? She said they was black boys." He further told that operator that he had seen one of the boys "walking through this neighborhood all the time," and described him as 18 years old, wearing a black shirt and blue jeans, and riding a ten-speed bike.

Jefferson Parish Sheriff Office (JPSO) Deputy Michael Burgess responded first to the reported rape from only a block away, arriving between 9:20 and 9:30. Deputy Burgess testified that he was so close to the crime scene when he got

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[6] These phone calls made to Arguello and Madere were not known to police until several days after the rape, and later served to shift the focus of the investigation to the defendant.

[7] Sergeant Billy Lewis identified a tape and summary of the 911 call.

the call that he thought he would actually catch the rape in progress. In fact, the transcript of the 911 call indicates Burgess arrived at the scene while the defendant was still talking to 911.

Burgess testified that he was confused when he arrived because the crime scene in the yard was inconsistent with a rape occurring there: there was a dog sleeping undisturbed nearby and a small patch of coagulated blood was found in otherwise undisturbed long grass. He did not see anyone fleeing on a bike.

Burgess testified that he heard voices from inside the house, approached the house through an open garage door, and proceeded through the garage to the back door. Inside the garage, he observed a straight thin line of blood drops on the concrete. The defendant came to the back door talking on the telephone, but ignored the officer as he tried to get information on the crime, continuing to talk on the phone. This prompted the officer to order the defendant to get off the phone and give him a description of the suspects so he could pursue them. Inside the house, Deputy Burgess did not see any more blood until they reached the stairs, which had a blood trail leading up them. Deputy Burgess testified that the defendant took him upstairs to the victim, who was lying sideways on the bed in her room, wearing a t-shirt, and wrapped in a bloody cargo blanket. The defendant was wiping his hands with a towel that had blood on it. When the officer asked where it came from, the defendant then told him he got the towel from the bathroom after he put the victim in the bathtub to clean her. The defendant told him further there was blood on the steps because he carried her up the stairs from the backyard like an infant. However, there was no blood on his own clothes and no blood trail from the circle of coagulated blood in the backyard.

Deputy Burgess testified he attempted to question the victim but she was only partially able to respond verbally to his questions at first. When Burgess questioned her, the defendant "kept trying to answer for her and [he] got a little upset with that." The victim told Burgess that she was selling Girl Scout cookies in the garage with her brother when two boys dragged her from the garage and one raped her.

Stephen Brown, EMS field supervisor for West Jefferson Medical Center, testified that he was in the ambulance that responded to the 911 call minutes later. He found the victim upstairs in the home, wearing a Pocahontas shirt, with her shorts pushed down around her ankles, and wrapped in a bloody cargo blanket. The defendant had a basin filled with water which he was using to wipe off the victim's genital area. The defendant told him he was wiping down the blood to see where the blood was coming from, at which point Brown directed him to stop. Brown then examined the victim and found she had blood oozing from her vaginal area, which he then covered with a pad.[8] Brown testified he attempted to interview the victim, but that the defendant interrupted the victim and tried to answer the questions for her.

Both Burgess and Brown testified that they considered the defendant's behavior to be atypical and ultimately suspicious.

Detective Brian O'Cull, formerly of JPSO, testified that he interviewed the defendant at 10:18 a.m. on March 2, 1998, about an hour after the rape was reported and before the defendant was a suspect, and that the interview was recorded.

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[8] Outside of the presence of the jury, Brown also stated that, in assessing the victim's blood loss, he noticed that the blood appeared to be more coagulated that it should have been if the time of the rape was reported accurately. This testimony was ruled inadmissible and not presented to the jury.

Detective O'Cull identified an audiotape and transcripts of this interview, in which the defendant claims that he found the victim lying in the yard behind the house with her shorts half-way off in a puddle of blood, and that he then grabbed a work blanket, picked her up on it and brought her into the house, where he sat her in the tub with the water running while he called 911. The defendant claimed that the victim told him two boys were involved, and he saw a 19-year-old boy he recognized from the neighborhood ride off on a blue ten-speed bicycle "with the handle bars turned up," which he had seen on previous occasions behind the empty house next door. The defendant also told O'Cull that he had called the school earlier to report that the victim was staying home because she was sick.

Detective Mike Hullihan testified that the defendant was *Mirandized* and interviewed by police later that day at the police station, although he was not a suspect at that time. The defendant told him that his wife left for work at 5:30 in the morning, and that after he fixed the victim breakfast, she vomited in the bathroom. After she vomited a second time, he gave her orange juice mixed with Tylenol and called school to report that she would be absent. The defendant stated that he was upstairs cleaning when the victim's younger brother came and told him that the victim was sick and lying in the yard. When the defendant went to investigate, he saw a black male fleeing on a bicycle and found the victim crying and lying in the yard with her panties and shorts next to her. The defendant told the officers he wrapped the victim in a cargo blanket, carried her upstairs, put her in the bathtub and called 911. The defendant described the attacker as a black male, about 250–270 pounds, wearing blue jeans and a black t-shirt, with a fade haircut and wearing a gold earring in his left ear, and fleeing on a light blue 10-speed bicycle with "upwards handle bars" on it. After taking the defendant to several locations in an effort to locate a bicycle similar to the one he described, the defendant identified one on display at K-Mart

and pointed to the light blue cap on a laundry detergent bottle as being the same color as the bike. Det. Hullihan testified that he was surprised that the defendant picked out this bike as a similar bike. A picture of this bike, which was not a ten-speed with handle bars turned up as earlier described by the defendant, but was instead a regular bike with straight handlebars, was introduced into evidence.

Sergeant Kelly Jones of the JPSO Personal Violence Division was lead investigator on the case. When she arrived at the defendant's home on March 2, she instructed the other officers to begin canvassing the neighborhood to look for the suspect and bike as described by the defendant.[9] In the side yard, she noticed a location in the grass which appeared to contain coagulated blood but the grass was not disturbed and she could not locate any blood leading away from this location. She observed four or five very small drops of blood on the concrete floor just inside the garage and several random small drops of blood leading up the stairs. She collected several items from the victim's bedroom, including the utility blanket she had been lying upon, the t-shirt she was wearing, a pair of black shorts and underpants, and a blood-stained towel.

Sergeant Jones then interviewed the victim at the hospital. The victim was in pain and described her attacker as a black male, age 18–19, medium build, with muscular arms. Sergeant Jones testified that the defendant was present during the interview and prompted the victim to include that the attacker had an earring and noted that they had seen the attacker cutting grass in the neighborhood previously. Sergeant Jones also testified that the defendant described the attacker as over 6' tall, large but not fat, with muscular arms,

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[9] Thirty officers canvassed the neighborhood looking for the suspects but to no avail.

and described the bicycle as a blue 10-speed with curled racing-style handlebars.

On March 3, Detective Florida Bradstreet interviewed defendant in connection with her discovery of a bike belonging to Devon Oatis behind a nearby apartment on Longleaf Lane in Harvey. The blue, gearless bicycle was found in tall grass and was described by Det. Bradstreet as covered with spider webs, rusted, with flat tires, and inoperable. It appeared to have been there for some time as the grass underneath it was indented and dead. The defendant positively identified the bicycle as the one on which he saw the subject ride away and stated that he saw this bike behind the house on Sunday evening. Contrary to the defendant's earlier description of the bike, before he identified a similar bicycle at K-Mart, this bicycle was not a ten-speed with handle bars turned up, but was a regular bicycle with straight handlebars. The defendant described the bicycle's rider to Det. Bradstreet as a husky individual of 260 to 280 pounds, but that he did not have "fat hanging." Later, the defendant described the suspect to Det. Bradstreet as 18-19 with a muscular build, a low fade haircut and a gold earring in his left ear.

After the defendant identified the bike that belonged to Devon Oatis, Sergeant Jones interviewed Oatis, a 16-year-old male, who was 6'11" tall and 270-280 pounds and appeared as being very heavy set. Sergeant Jones testified that she interviewed Oatis, a juvenile, in the presence of his mother. They both gave statements, which Sergeant Jones determined to be false by investigating further at John Ehret High School.[10] However, Sergeant Jones testified that Oatis was

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[10] Outside of the presence of the jury, Sergeant Jones stated that Oatis had been expelled from John Ehret High School in November, did not inform his mother of the expulsion, and that his mother would drive him to school every day, after which he would walk back home, where he spent each day while she was at work. On March 2, Oatis's friend called his mother,

ruled out as a suspect because his physical description did not match those given by the victim and the defendant and because his bicycle was inoperable.

In the meantime, the victim continued to claim that two boys on a bicycle pulled her from the garage and one of them raped her in the yard. Dr. Benton testified that when he first examined the victim at Children's Hospital, she reported to him that two boys took her from the garage and one raped her while the other watched. Dr. Benton testified that medical records showed that the victim told all hospital personnel this same version of the rape while she was at the hospital, but that she told one family member that the defendant raped her. In addition, several days after the rape, the victim was interviewed by psychologist Barbara McDermott, and the videotaped interview was introduced by the defense at trial.[11]

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pretending to be a school official, to inform her that he had been suspended for fighting and to instruct her to pick him up from school and take him home, which she did.

[11] The state and the defense stipulated that these videotaped interviews satisfied the requirements of La. R.S. 15:440.5. The interviews were videotaped on two successive days and submitted on two videotapes as defendant's exhibit 7 and 8, which were transferred to DVD and viewed in that format.

The first day is primarily devoted to collecting personal and familial history. On both days, the victim was questioned on her ability to distinguish truth from lies. On the second day, the victim was told that she must tell what happened to her. The victim initially refused and began to comply only after her favorite police officer, "Miss Rene", was brought into the room for support. This officer hugged the victim, and could be heard quietly asking the victim to trust her, and encouraging her to tell the truth about what happened. "Miss Rene" told her they want to know if her Dad did it and they want to make sure she is safe. The victim said "they want me to say my Dad did it and I don't want to say it. I'm going to tell the same story." She then said that nobody told her to change her story, but her Mom told her that may be why they want her to keep on telling her story.

In this interview, lasting for three hours over two days, the victim said that she woke up, watched television, and ate breakfast, which was prepared by the defendant, whom she called "Daddy." The victim said she was playing in the garage with her brother when she was approached by a boy who asked her about Girl Scout cookies. After a long delay, she said she fell off a ledge at the end of the garage and the boy pulled her by the legs across the concrete into the neighbor's yard with the other boy following them. She was trying to grab the grass while he was dragging her. The boy then pulled down his pants and her shorts, placed his hand over her mouth, and "stuck his thing in [her]." She could not go anywhere because he was on top of her and the other boy was behind her. When another boy saw the defendant through the window, they both fled on a bicycle. She forgot what both boys looked like and did not remember what either boy had on, though she thought one had on a black shirt and blue jeans. She did not remember anything after that until the ambulance arrived. Dr. McDermott questions the victim thoroughly and argumentatively on each element of the victim's story, telling the victim that her story does not make sense. For example, Dr. McDermott asks the victim why she did not suffer abrasions from being dragged across concrete by her legs, and asks her why she did not scream if the attacker's hand was not placed over her mouth until they reached the neighboring yard.

In spite of the victim's version of events as stated above, the focus of the investigation began to shift toward the defendant. On March 4, 1998, the police found out for the first time about the defendant's phone calls to his employer,

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The victim was extremely reluctant, stalled, spoke haltingly with long pauses, and ultimately told her version of the attack, while constantly asking to be reminded what she had said so far. She denied suffering nightmares or experiencing any fear that the rapist might return.

A. Arpet Moving Co., hours before he made the 911 call, telling Arguella that he would not be into work and asking him how to get blood out of a white carpet because his stepdaughter "had just become a young lady." Sergeant Darryl Monie testified that on March 4, the defendant evidently knew the police had this information, and explained that he called his employer at about 5:15 a.m. to report that he was available for work that day. However, the defendant told him he called his employer back after the police had arrived at his house, first to inform him that he could not come to work because "his little girl had become a young lady," and then later because she had been raped. The defendant also told Sergeant Monie that he sought advice in the first phone call on removing bloodstains from carpet.

On March 9, 1998, the police also found out about the defendant's call to B&B Carpet Cleaning, after Mr. Madere contacted them after seeing blood-stained carpets being removed from the defendant's home on the televised news. As stated earlier, the defendant made this call at 7:27 a.m., almost two hours before the defendant claimed the victim had just been raped, to request an urgent carpet cleaning job to remove blood stains.[12] The defendant was arrested and charged with aggravated rape on March 10, 1998.

The State relied heavily on the testimony of Mr. Madere and Mr. Arguello because it created a time line indicating that the rape did not occur as reported by the defendant, i.e, that the rape occurred much earlier in the morning than reported

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[12] On cross-examination, Lieutenant Gray Thurman testified that he spoke with Madere, who showed him a carpet-cleaning appointment made by defendant, which the B&B computer indicated was made on March 1 and scheduled for March 5. However, Thurman testified that Madere explained that the computer was in error and that the appointment was made on March 2 and rescheduled for March 5 after Theriot was unable to do the job on March 2.

by the defendant, that the defendant waited several hours before calling 911, and that the defendant was apparently attempting to clean up evidence of the crime in the meantime. The police also became aware of physical evidence that the crime scene had actually been cleaned.

Sergeant Jones testified that pursuant to search warrants issued on March 4, 5, 7, and 8, 1998, luminol testing of areas in the victim's home presumptively established the presence of blood in a large area of the carpet at the foot of the victim's bed, on the carpet pad and on the sub-floor beneath. Sergeant Jones testified that a stain was observed on the sub-floor following the removal of the carpet and padding. The police also found a one-gallon jug container labeled "SEC Steam Low Foam Extraction Cleaner" found in the garage, and a pail and two towels from the bathroom sink. The police also discovered a stain on the underside of the victim's mattress and mattress pad, which they initially believed indicated defendant had altered the crime scene by turning over the mattress. Sergeant Charles Durel of the JPSO Crime Lab identified his sketches and photographs of the home, which showed the presumptive locations of blood visualized with luminol. Samples of several of these items from these locations were subsequently tested by Drs. Henry Lee and Michael Adamowicz of the Connecticut State Police Forensic Science Lab in 1998. Dr. Lee testified that liquid dilution demonstrated that someone had attempted to clean some bloodstains from some of the carpet samples. Dr. Adamowicz tested samples of a mattress pad and carpet and a vaginal swab of the victim. Dr. Adamowicz found no DNA on the mattress. He found otherwise unidentifiable human DNA on the carpet. He found the victim's DNA on some carpet samples, the cargo blanket, a towel, and a sanitary napkin. However, the defense had the mattress pad tested by Dr. Carolyn Van Winkle, senior forensic biologist at the Tarrant County Medical Examiner's Lab, who testified that she re-tested the same mattress pad in 2001 using a more sensitive

test that came into common usage after 1998, and absolutely could rule out the victim as the source of blood on the mattress pad.

Dr. Lee also testified as an expert in serology, DNA, crime scene analysis and reconstruction, and general criminalistics. Dr. Lee found no semen in the victim's shorts. No seminal fluid or spermatozoa was found in any of the swabs taken from the victim at the hospital. Because of the lack of positive evidence related to the defendant, the bulk of Dr. Lee's testimony was devoted to discussing the absence of evidence that might confirm the defense's theory that the victim was raped in the yard as she initially stated. He stated that he examined the shirt and shorts the victim was wearing for any grass or soil stains but could not find any, indicating that the victim was not dragged through the grass as she initially claimed. He also did not find any abrasion marks consistent with being dragged. He opined that blood staining on the back of the victim's shorts was consistent with the shorts being placed on the victim after she was raped. He also examined the victim's underwear and found a blood transfer stain on the back of them and did not find any grass or soil stains on them. He examined photographs of the crime scene outside and found nothing to indicate that a struggle had taken place, as there were no depressions in the grass and only a small blood stain sitting on top of the grass, indicating a low-velocity dripping, suggesting that the blood had been planted there.

Finally, and most important for the State was the testimony of the victim, supported by the testimony of her mother, C.H. C.H. testified at trial that she married the defendant in 1998. After the rape, the victim was removed from her custody for approximately one month because she had permitted the defendant, who was in jail, to maintain phone contact with the victim. C.H. testified that soon after the victim was returned to her custody, the victim for the first

time reported to her that defendant had raped her.[13] She testified that the victim was in the room she shared with her younger brother, crying as her mother had never seen her cry before. After she allowed the victim to come sleep in her room, the victim told her that she could not hold it in anymore and that the defendant was the one who raped her.

The victim, who was eight when raped and nearly fourteen years old at the time of trial, took the stand during the fifth day of testimony. Upon taking the stand, one of the prosecuting attorneys stepped out of the courtroom for a few minutes. Defense counsel objected that the victim was permitted to sit on the stand during this delay and cry while the jury watched. The defense approached the bench to move for a mistrial, which motion was denied. After some brief questions about her age, the State asked "Do you remember what happened to you in 1998," to which the victim answered "yes." When asked to tell what happened, the victim stated "I woke up one morning and Patrick was on top of me and." She evidently then lost her composure, which required the court to recess, at which time the defense again moved for, and was denied, a mistrial.

During that recess, out of the presence of the jury and in a discussion at the bench, pursuant to a joint stipulation, the state offered a videotaped interview performed on December 16, 1999, at the Child Advocacy Center (CAC) by Amalee Gordon. After the recess ended, the victim testified that she was interviewed by Amalee Gordon on December 16, 1999. The state then formally offered the videotaped interview into evidence and offered to stipulate that the tape was edited to satisfy the rules of evidence and that the tape in fact satisfied all of the statutory requirements that were previously

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[13] The parties stipulated that the victim was returned to her mother on June 22, 1998.

discussed with defense counsel at the bench.[14] Defense counsel formally accepted the stipulation, stating "We would agree with that stipulation, Your Honor, and we have no objection to the tape." Although the videotape was offered into evidence after the victim lost her composure on the stand upon accusing the defendant, it is apparent that both parties knew from the outset of trial that the videotape would be introduced into evidence, as defense counsel asked the jury during opening statements to watch this tape closely and compare it with the first videotape made in March of 1998, in which the victim accuses two boys of dragging her out of her garage and one of them raping her.

The videotape was played at that time for the jury while the victim remained seated on the stand. After the tape was played for the jury, the defense approached the bench and again moved for a mistrial on the basis that, while the tape was played (for approximately 23 or 24 minutes), the jury could observe the victim crying as she watched the tape. This motion was denied.[15]

This videotape has been reviewed and is briefly summarized as follows. The victim and the interviewer sit in chairs against the backdrop of a quilt. The interviewer notes that Sergeant Kelly Jones is also present working the equipment and on one occasion points to the quilt, implying that Sergeant Jones is behind it. The interviewer informs the victim that she is present because something happened to her

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[14] At the bench conference, both parties stipulated that the videotape complied with the requirements of La. R.S. 15:440.5, discussed *infra*, and had been edited to comply with the Rules of Evidence.

[15] In denying this motion, the district court noted that, although the victim had tears in her eyes at one point during the viewing of the tape, there was no outburst or excessive display of emotion by the victim and the jurors did not appear to react in a way that would indicate they were upset by the victim's response to the tape.

and asks whether she knows what that is, to which the victim responds that she was raped by Patrick Kennedy. The victim states that she woke up one morning and the defendant was on top of her. He raped her, saw that she was bleeding, and called the police after informing her that she had better tell them the story he made up. The victim could not recall what that story was. The interviewer probes for additional details and the victim can state only (over the course of about fifteen minutes) that it happened in her room, on the bed, with the defendant's hand covering her eyes, while her shorts were off and the defendant was naked. The victim draws her bed showing the location the rape occurred and identifies her and the defendant's "private parts" on male and female outline drawings as the only place (with the exception of his hand over her eyes) that the defendant touched her. The defendant did not make her do anything else or say anything else to her. After she was raped, the victim said she fainted and did not remember anything until the ambulance arrived to take her to the hospital. At the hospital, other people asked her questions. She could not remember what they asked her other than for her birth date. The victim knew that she had bled and recalled seeing blood on her bed but nowhere else. This video was crudely edited to excerpt only admissible portions of the victim's statements.[16]

After this videotape was played, the victim remained on the stand and testified on direct and cross-examination. Her testimony in full is as follows:

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[16] A substantially longer unedited tape, which was not available to the jury, was also viewed. In it, the victim makes, and in some cases also retracts, somewhat vague accusations that the defendant raped her on other occasions. The trial court denied the state's motion to introduce these prior rapes at a pre-trial *Prieur* hearing.

By Mr. Paciera:

Q. You're alright?
A. Yes.
Q. Okay, when we looked at that tape, that was I think from December of 1999. You were a lot younger then?
A. Yes.
Q. And that was almost a year and a half after this happened to you, is
that right?
A. Yes.
Q. So when this happened to you, you were even smaller and younger?
A. Yes.
Q. When this first happened to you, you said somebody else did this, do you remember?
A. Yes.
Q. Do you remember what you said?
A. Yes.
[Defense object to leading questions and judge admonishes]
Q. When this first happened, what did you say happened?
A. I said two black boys raped me.

. . .

Q. Did two black boys do this to you?
A. No.
Q. Were you outside at all when this happened to you?
A. No.
Q. Were you ever in the garage when this happened to you?
A. No.
Q. Were you ever downstairs in the house when this happened to you?
A. No.

Q. After this happened to you, did you ever go downstairs?
A. No.
Q. Who told you about saying two boys did it?
A. Patrick.

. . .

Q. Who was home the day this happened?
A. Me, my brother and Patrick.
Q. And where had your Mom gone?
A. To work.
Q. Was it still early morning or midday or do you remember what time this happened?
A. Morning.
Q. After this happened to you, what did Patrick do?
A. He got up, I'm not sure where he went, but he left my room and he came back.
Q. Did he have anything when he came back?
A. No.
Q. Was he carrying anything?
A. No.
Q. Okay, was there some point when he came in and he was carrying anything?
A. Yes.
Q. What was he carrying?
A. A cup of orange juice and pills chopped up in it.
Q. And what did he do with the orange juice with the chopped up pills?
A. He gave it to me.
Q. Now, after this happened to you, did it injure you, did you bleed? Not the orange juice, when you were raped.
A. Yes.
Q. Did you bleed?
A. Yes.
Q. Did anyone ever clean you?
A. No.

Q. When you said Patrick, he left your room, is that what you said?
A. Yes.
Q. And could you tell where he was or could you hear him?
A. Not when he left the first time.
Q. Okay, well, could you hear some other time?
A. Yes.
Q. What could you hear?
A. I heard when he was on the phone with his boss.
Q. What'd he tell his boss?
A. He told his boss that his daughter had became a young lady and he couldn't come in today.
Q. Did you stay in the bedroom the whole time after this happened until the police got there or - -
A. No.
Q. What happened?
A. I was throwing up and he carried me to the bathroom.
Q. Were you throwing up after he did this?
A. Yes.
Q. And when he brought you into the bathroom, what bathroom did he bring you into?
A. In the hall bathroom.
Q. Did you throw up anymore?
A. I threw up in the tub.
Q. How did you get back to your bedroom after that?
A. I don't remember.
Q. You don't remember? Do you remember either the police getting to your house or somebody else like a doctor kind of person getting to your house?
A. I remember the police coming.
Q. How did you feel when the police came? Okay, I'll ask another question. Did you talk to the police?
A. While I was in the room?
Q. What's that?
A. While I was in the room?

Q. While you were in the room, if you remember.
A. I don't remember.
Q. Do you remember going to the hospital?
A. Yes.
Q. Do you remember how you got to the hospital?
A. Yes.
Q. How did you get to the hospital?
A. In the ambulance.
Q. Do you remember being at the hospital? You, okay, do you remember being at the hospital?
A. Yes.
Q. Do you remember talking to any doctors at the hospital?
A. Yes.
Q. Did anybody tell you what they were going to have to do to help you?
A. Yes.
Q. And what did they tell you or what did they do to help you?
A. While I was in the hospital?
Q. Yes.
A. When I first got there?
Q. We don't have to be real specific but did the doctors do some kind of surgery on you?
A. I don't know.
Q. Did they give you medicine?
A. Yes.
Q. Did it put you to sleep?
A. Yes.
Q. The person, Patrick that you said did this to you, I want you to point to him right now.

Mr. Paciera: Please let the record reflect that the witness is pointing to the defendant, Patrick Kennedy.
Q. Is everything that you're saying in this courtroom today the truth?
A. Yes.

Q. Did you hear yourself when you were on that tape from December of 1999?
A. Yes.
Q. Is everything you heard on there the truth?
A. Yes.Q. That this person raped you?
A. Yes.
Q. Nobody else?
A. Nobody else.
Q. In your room?
A. In my room.
Q. Thank you, [L. H.]. I want you to answer this lady's questions.

On cross-examination, the victim testified that she remembered telling the police and people at the hospital that someone else did this to her, that after the rape the defendant did not live with them anymore, that she had to leave her mother and brother and go live with another family for a while and this was upsetting to her, and that she first told her mother that the defendant was the one that raped her right before she had the interview with Amalee Gordon. She could not remember certain other details, such as talking to one of the defense attorneys a year-and-a-half after the rape, talking to certain police officers after the rape, or making the first videotaped statement.

After the State rested its case, the defense presented evidence attempting to show that Oatis was the likely rapist, pointing out that he lied about being in school that day and that the defendant had identified his bike as the one the suspect used.[17] To counter the state's witnesses'

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[17] Sergeant Jones testified that eighth-grader, R.R., was also considered a potential suspect after it was reported to the police that R.R. told his classmates that he committed the rape. However, Linda Gilmore, a teacher's assistant at the Jefferson Community School testified that R.R. was present in school on March 2, 1998. Lieutenant Thurman investigated further and found R.R.'s alibi supported by the school's principal, a coach,

characterization of the bike as inoperable, the defense presented the testimony of Kimberly Parnell, a nearby resident who was interviewed by police when they canvassed the neighborhood. She testified that she often saw several young men, including Oatis, in the neighborhood riding this same bike, some of whom used it to sell drugs, and that she saw Oatis refill the tires with air before riding it because of its poor condition. Ronnie Montgomery, a private investigator hired by the defense, testified that he was unable to locate Oatis.

A cornerstone of the defendant's case was that the victim was coerced into changing her story, and that a comparison of the first and second videotapes showed that the first tape was much more detailed than the second, suggesting that the first was more truthful. The defense also presented evidence attempting to show that the victim's mother, C.H., changed her story in order to be reunited with her daughter. Catherine Holmes, a family friend, testified that C.H. expressed great fear that she would lose custody of her daughter. According to Holmes, C.H. described visiting her daughter after she was removed from her home and telling the victim that it was okay to tell people that defendant raped her because C.H. was instructed to do so by "them." After the victim was returned to C.H., Holmes said C.H. cut off all contact with her. Robert Tucker, a private investigator hired by the defense, testified that he interviewed the victim in 1999 and that she told him that she was raped by a young man who fled on a bicycle and that defendant did not rape her. Tucker said that C.H. told him that she was afraid, based on harassment and threats from police and social workers, that she would lose custody of her

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Ms. Gilmore, the school's attendance records, and by witnesses who told him they saw R.R. picked up for school by bus at 7:45 a.m. Sergeant Jones testified that R.R. is about 5'3" with a lighter complexion and younger than any of the descriptions of the attacker.

daughter. The defense also stressed the lack of any physical evidence directly linking the defendant to the crime.

After hearing all this evidence, the jury returned a guilty verdict of aggravated rape, which necessitated a capital sentencing phase. The State presented the testimony of S.L. The defendant was married to S.L.'s cousin and godmother, C.S., and S.L. spent the summer with defendant and C.S. when she was about eight or nine years old. S.L. testified that defendant sexually abused her three times, the first involved inappropriate touching, the last was intercourse. She did not tell anyone until two years later and the family pressured her not to pursue legal action so she did not. The defense presented seven witnesses who testified as to the effect defendant's execution would have on his family and friends. At the conclusion of the penalty phase, the jury unanimously determined that defendant should be sentenced to death.

The defendant filed a motion for a new trial as to the guilt and penalty phase verdicts, a motion for judgment notwithstanding the verdict, and a motion in arrest of judgment, all arguing that the statute under which defendant was prosecuted, La. R.S. 14:42, is unconstitutional. After denying these motions, the court sentenced defendant to death in accordance with the jury's verdict. Defendant now appeals to this Court, assigning 69 errors. We will address the most significant of these errors in this opinion, and the remaining errors will be addressed in an unpublished appendix to this opinion.

Before addressing the overriding legal issue presented by this appeal, which is whether the statute under which defendant was prosecuted is constitutional in that it authorizes the death penalty for a non-homicide crime, we must first address whether the defendant's conviction must fall for any other reason assigned by the defendant.

I. Right of Confrontation and the Videotaped Victim Interviews

On appeal, the defendant raises several assignments of error related to his right of confrontation arising from the admission of the victim's videotaped interview conducted by Amalee Gordon, in which the victim accuses the defendant. First, the defendant argues that the statute which authorized the use of the videotape, La. R.S. 15:440, *et seq.*, is unconstitutional. Further, the defendant argues that the admission of the videotape constituted a statutory violation of La. R.S. 15:440, *et seq.*, because the victim was unavailable for cross-examination.

The Confrontation Clause of the Sixth Amendment safeguards the defendant's rights to confront his accusers and to subject their testimony to rigorous testing in an adversary proceeding before the trier of fact. *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930 (1970). Although face-to-face confrontation forms the core of the Clause's values, it is not an absolute right of the defendant. *Id.*; *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S. Ct. 2531, 2537 (1980). Through exceptions to the hearsay doctrine, testimony may be introduced against the defendant without a physical, face-to-face confrontation at trial under certain circumstances, provided the denial of such confrontation is necessary to further an important public policy interest and further provided that the testimony's reliability is otherwise assured. *Coy v. Iowa*, 487 U.S.1012, 108 S. Ct. 2798 (1988).

One recognized important public policy interest is the protection of abused children. *Id.*; *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157 (1990). Louisiana is one of many states which have developed special procedures to protect child witnesses testifying about abuse from unnecessary additional trauma, allowing videotaped statements of abused children to be admitted in court, provided certain conditions

are met, La. R.S. 15:440 *et seq.*, and allowing abused children to testify out of court via closed circuit television systems, La. C. Cr.P. art. 283. However, Louisiana's provisions creating special arrangements for abused children contain strict requirements designed to ensure that these accommodations do not compromise the rights of defendants to confront adverse witnesses and test the reliability of their testimony.

The legislature first authorized the videotaping of victim statements in cases of child abuse in which the victim was under the age of 14 years at the time of the offense. 1984 La. Acts 563; La. R.S. 15:440.1-440.6. The purpose of the legislation was to facilitate prosecution of offenders who have committed crimes of violence against children "with a minimum of additional intrusion into the lives of such children." The statute authorizes videotaping the statements of such victims and introducing the statements at trial "as an exception to the hearsay rule." La. R.S. 15:440.3. It sets out conditions for taking the statement in the absence of the child's parents or relatives and with a minimum of questioning "calculated to lead the child to make any particular statement." La. R.S. 15:440.4.[18]

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[18] La. R.S. 15:440.4 provides as follows:

> Method of recording videotape; competency
> A. A videotape of a protected person may be offered in evidence either for or against a defendant. To render such a videotape competent evidence, it must be satisfactorily proved:
> (1) That such electronic recording was voluntarily made by the protected person.
> (2) That no relative of the protected person was present in the room where the recording was made.
> (3) That such recording was not made of answers to interrogatories calculated to lead the protected person to make any particular statement.
> (4) That the recording is accurate, has not been altered, and reflects what the protected person said.
> (5) That the taking of the protected person's statement was supervised by a physician, a social worker, a law enforcement

In order to be admissible, the videotape must meet the requirements of La. R.S. 15:440.5, which provides as follows:

> 440.5. Admissibility of videotaped statements; discovery by defendant
>
> A. The videotape of an oral statement of the protected person made before the proceeding begins may be admissible into evidence if:
>
> (1) No attorney for either party was present when the statement was made;
>
> (2) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;
>
> (3) The recording is accurate, has not been altered, and reflects what the witness or victim said;
>
> (4) The statement was not made in response to questioning calculated to lead the protected person to make a particular statement;
>
> (5) Every voice on the recording is identified;

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officer, a licensed psychologist, a licensed professional counselor, or an authorized representative of the Department of Social Services.

B. The department shall develop and promulgate regulations on or before September 12, 1984, regarding training requirements and certification for department personnel designated in Paragraph (A)(5) of this Section who supervise the taking of the protected person's statement.

(6) The person conducting or supervising the interview of the protected person in the recording is present at the proceeding and available to testify or be cross-examined by either party;

(7) The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and

(8) The protected person is available to testify.

B. The admission into evidence of the videotape of a protected person as authorized herein shall not preclude the prosecution from calling the protected person as a witness or from taking the protected person's testimony outside of the courtroom as authorized in R.S. 15:283. Nothing in this Section shall be construed to prohibit the defendant's right of confrontation.

C. In a criminal prosecution, when the state intends to offer as evidence a copy of a videotaped oral statement of a protected person made pursuant to the provisions of this Subpart, the defendant may be provided a copy of the videotape if the court determines it necessary to prepare a proper defense. If the court orders the defendant be provided a copy of the videotaped statement, only the attorney and the defendant shall be permitted to view the tape and no copies shall be made by any person. The copy shall be returned to the court immediately upon conclusion of the case. Any violation of this Subsection shall be punished as contempt of court.

At trial, after the victim took the stand, the State offered the videotape into evidence and defense counsel stipulated that the videotape was in compliance with the requirements of

La. R.S. 15:440.5. In addition, defense counsel expressly stated that it had "no objection" to the admissibility of the tape. Furthermore, as early as the opening statement, the defense calculated the December 16, 1999, videotape would be played for the jury, as it instructed the jury to watch both this videotape and the March, 1998, videotape closely because the March, 1998, videotape would provide more detail and thus be more truthful. However, now, the defendant characterizes the impact of the admission of this tape as devastating to his case.

The defendant concedes that these issues were not presented to the court below, as defense counsel expressly stipulated to the admission of the tape and stated he had "no objection to the tape." However, he contends that La. R.S. 15:440.5 is unconstitutional on its face, which can be addressed by this Court in the absence of contemporaneous objection in the court below. He argues that under existing jurisprudence this Court may consider its validity despite the failure of the defense to move to quash the statutory provisions or otherwise object on confrontation grounds to the admission of the videotaped statement.[19] *See State v. Green*, 493 So. 2d 588, 590 (La. 1986) (The facial unconstitutionality of a statute on which a conviction is based is an error discoverable by the mere inspection of pleadings and proceedings, without inspection of the evidence, which an appellate court is entitled to review, even though the

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[19] The defendant also argues in brief that even assuming the lack of objection barred direct review of the trial court's evidentiary ruling, "given the devastating impact of the videotape, to the extent the failure to object constitutes a waiver, it is clear that such a failure would constitute ineffective assistance of counsel." However, at oral argument, defense counsel specifically stated to the Court that it was not making an ineffective assistance argument at this stage of the proceedings. Thus, we do not consider whether lack of an objection constituted ineffective assistance of counsel and find that it does not provide grounds for us to consider defendant's unobjected to assignment of error.

defendant did not comply with the assignment of error procedure.) However, this Court has applied this rule only in the context of challenges to the facial validity of substantive criminal statutes. In this case, the statutes at issue concern only the nature of the evidence admitted at trial. As with any other ruling by a trial court admitting or excluding evidence, defendant must object to the ruling to preserve the issue for review. La. C.Cr.P. art. 841 ("[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence."); *State v. Thomas*, 428 So. 2d 427, 433 (La. 1982) (on rehearing) (the contemporaneous objection rule prevents "a defendant from gambling for a favorable verdict and then resorting to appeal on errors that might easily have been corrected by objection."). In the present case, defense counsel not only failed to object to the admission of the videotape but he also stipulated to its admissibility.

However, assuming the facial unconstitutionality of this statute can properly be considered in the absence of an objection at trial, we reject defendant's argument that this statute is unconstitutional on its face.[20] The defendant argues

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[20] Although this Court never considered the constitutionality of the original act, in a string of cases the circuit courts of Louisiana upheld the statutes in cases in which the victim actually appeared in court and testified. *See State v. Abbott*, 29,497, (La. App. 2 Cir. 6/18/97), 697 So. 2d 636, 640-41 (admission of videotape of interview between child victim and police officer does not violate confrontation principles when child and interlocutor both testify); *State v. Gray*, 533 So. 2d 1242, 1248-49 (La. App. 4 Cir. 1988) (videotaped testimony does not violate Confrontation Clause, at least when witnesses testify); *State in the Interest of R.C.*, 514 So. 2d 759, 761-65 (La. App. 2 Cir. 1987) (availability of witness to testify prevents statute from violating Confrontation Clause); *State v. Guidroz*, 498 So. 2d 108, 110-111 (La. App. 5 Cir. 1986) (defendant's right of confrontation not violated because defense counsel viewed the tape before trial and victim testified); *State v. Feazell*, 486 So. 2d 327, 330-331 (La. App. 3 Cir. 1986) (Confrontation Clause not violated when the state offered videotape in evidence as direct testimony and tendered witness in person for cross-examination); *but cf. State v. Navarre*, 498 So.

that *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), makes clear that the admission of "testimonial" statements, such as the victim's in this case, violates the Sixth Amendment.

Traditionally, for purposes of the Confrontation Clause, all hearsay statements were admissible if: (1) the declarant was unavailable to testify; and (2) the statement fell under a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L. Ed. 2d 597 (1980). However, in *Crawford*, the United States Supreme Court overruled *Roberts* insofar as it applies to out-of-court statements that are "testimonial" in nature. The Court held that the adequate "indicia of reliability" standard set forth in *Roberts* is too amorphous to adequately prevent admission of "core testimonial statements that the Confrontation Clause plainly meant to exclude." *Crawford*, 541 U.S. at 63, 124 S. Ct. at 1371.

The *Crawford* Court drew a distinction between testimonial and non-testimonial hearsay and noted that non-testimonial hearsay is admissible when both prongs of *Roberts* are satisfied, regardless of whether the defendant has had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 63, 124 S. Ct. at 1371. On the other hand, the Court held that testimonial hearsay statements may

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2d 194, 196 (La. App. 1 Cir. 1986) (admission of videotaped victim interview without allowing defendant to cross-examine the victim violates statute and confrontation principles). However, other courts considering the question have come to the opposite conclusion even in cases in which the victim was available to testify. *See, e.g., Offor v. Scott*, 72 F.3d 30, 33 (5th Cir. 1995) ("Nor is it an answer [under the Confrontation Clause] that the defendant might have called the child in order to cross-examine.").

be admitted as evidence at a criminal trial only when the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. *Id.* The Court also declined to provide a comprehensive definition of "testimonial," observing that, "whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*, 541 U.S. at 68. "These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* [21]

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[21] In the companion cases, *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. __, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court found it necessary to fashion a test, albeit an admittedly non-exhaustive one, *Id.* 126 S. Ct. at 2273, for the determination of whether statements should be classified as testimonial or non-testimonial. The Supreme Court held that:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id., 547 U.S. at ____, 126 S. Ct. at 273-74. The Court then applied this test in *Davis* and found that statements made to a 911 operator were non-testimonial because they constituted "a call for help against a bona fide threat" by a caller who "was facing an ongoing emergency" and they were elicited by the 911 operator to "resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *Id.*, 547 U.S. at ____, 126 S. Ct. at 2274 (emphasis in original). The Court applied the new test in *Hammon* (the companion case) to find that statements made by a battered wife, who initially claimed that she was fine and nothing had happened, to an officer responding to a domestic disturbance call, were testimonial because "there was no emergency in progress; [the officer] had heard no arguments or crashing and saw no one throw or break anything, . . . and there was no immediate threat to [the victim's] person." *Id.*, 547 U.S. at ___, 126 S. Ct. at 2278.

While *Crawford* did establish as an important requirement for Sixth Amendment purposes that the defendant have a prior opportunity to cross-examine the declarant, and that requirement was clearly not met in this case, *Crawford* also expressly stated:

> Finally, *we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See California v. Green*, 399 U.S. 149, 162, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)). It is therefore irrelevant that the reliability of some out-of-court statements "cannot be replicated, even if the declarant testifies to the same matters in court." *Post*, at 1377 (quoting *United States v. Inadi*,

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The Court acknowledged that "a conversation which begins . . . to determine the need for emergency assistance . . . [can] evolve into testimonial statements, . . . ," *id.*, 547 U.S. at ____, 126 S. Ct. at 2277, but suggested that:

> [T]rial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through in limine procedure, they should redact or exclude the portions of any statement that have become testimonial, ...

Id., 547 U.S. at ____, 126 S. Ct. at 2277-78.

Although not specifically enumerated as such in *Crawford* or in the companion cases that followed, it is difficult to contend that a child victim's videotaped accusation, which was obtained by the state in preparation for trial long after the emergency, as in the instant case, is anything other than clearly testimonial. The videotaped statement constitutes an out-of-court statement offered to prove the truth of the matter asserted, *i.e.*, that the defendant raped the victim.

> 475 U.S. 387, 395, 106 S.Ct 1121, 89 L. Ed. 2d 390 (1986)). The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (Emphasis added.)

541 U.S. 59, n. 9. Therefore, according to *Crawford*, a testimonial videotaped statement is not inadmissible under the Sixth Amendment if "the declarant is present at trial to defend or explain it." *Id.*

Thus, it is clear that La. R.S. 15:440.5 is not facially unconstitutional as it specifically requires as a condition of admissibility that "the protected person is available to testify." La. R.S. 15:440.5(8). Whether the victim was actually "available to testify" or "present at trial to defend or explain" her statement is thus the only remaining issue related to the admissibility of the videotape. This raises the related questions of whether the statute is constitutional as applied in this case, and/or whether the admission of the tape was a statutory violation of La. R.S. 15:440.5(8), because, as urged by the defendant, although she took the stand at trial, her lack of memory rendered her "unavailable."

Once again, we note that the defendant stipulated to the admissibility of the tape before it was played and expressly stated that he had "no objection to the tape." Even after the cross-examination, he still did not object on the grounds that the victim's alleged lack of memory rendered her unavailable. Thus, this objection is clearly waived. La. C.Cr.P. 841. However, in an abundance of caution, we find that even had defendant objected, we would still find that the victim was "available to testify" for purposes of La. R.S. 15:440.5(8) and the Confrontation Clause.

The defendant argues that although the victim was physically present to testify, she was unable to respond to questioning in a meaningful way and simply adopted her

videotaped statement, which was obtained without the presence of defense counsel or any opportunity to effectively cross-examine the witness either pre-trial or at trial. Defendant contends that the victim's poor memory rendered her unavailable for cross-examination despite her physical presence on the stand.

We disagree. A witness may be physically present in a courtroom and still be "unavailable." *See, e.g., State v. Nall*, 439 So. 2d 420 (La. 1983); *State v. Pearson*, 336 So. 2d 833 (La. 1976); *State v. Ghoram*, 328 So. 2d 91 (La. 1976). However, since the Supreme Court's decision in *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970), the Court has made clear that "[t]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish.'" *United States v. Owens*, 484 U.S. 554, 561, 108 S. Ct. 838, 842, 98 L. Ed. 2d 951 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S. Ct. 2658, 2664, 96 L. Ed. 2d 631 (1987) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294, 88 L. Ed. 2d 15 (1985)) (emphasis in original). In *Owens*, the trial court allowed the admission of the testimony of a witness with amnesia that although he remembered identifying defendant as his attacker, he no longer had an independent memory of the attack. *Id.* at 840-41. The Supreme Court found that this was not in violation of defendant's Confrontation Clause rights because, even though amnesia rendered effective cross-examination difficult, it did not deprive defendant of "an opportunity for effective cross examination." *Id.* at 842.

In this case, the victim was able to answer the vast majority of the questions asked of her. *See, supra* pp. 12-18. In court, she identified defendant as the person who raped her, and testified that she remembered making the videotape, that everything happened as she reported on the videotape, that

she earlier had told police and others that a boy had raped her but that was a lie, and she testified about circumstances surrounding the rape. The fact that she could not remember meeting with specific people during the investigation and that she did not remember making the first videotape with Dr. McDermott does not render her "unavailable" for purposes of the statute or the constitution. She was clearly able to "defend or explain" the videotaped statement at trial. These assignments of error lack merit.

The defendant next claims that the admission of C.H.'s testimony that L.H. told her the defendant raped her violates the hearsay rule. As stated above, C.H. followed the victim to the stand and told jurors that after her daughter returned to her custody in 1998, L.H. came to her one night and confided that "she couldn't hold it [in] anymore that Patrick Kennedy had raped her." The state offered C.H.'s testimony over defense hearsay objections as "the first reporting to her mother," for purposes of La.C.E. art. 801(D)(1)(d) (defining as non-hearsay the prior consistent statement of a declarant who testifies in court subject to cross-examination referring to an "initial complaint of sexually assaultive behavior.") The statutory provision reflects a longstanding jurisprudential rule exempting the initial report of a child rape victim from the hearsay rule. *See, e.g., State v. Prestridge*, 399 So. 2d 564, 572 (La. 1981) ("[I]n the prosecution of sex offenses the better rule is that the original complaint of a young child is admissible when the particular facts and circumstances of the case indicate that the complaint was the product of a shocking episode and not a fabrication."); *State v. Adams*, 394 So. 2d 1204, 1212 (La. 1980) (same); *State v. Noble*, 342 So. 2d 170, 173 (La. 1977) (same).

We find this statement clearly was not made under emergency circumstances shortly after the offense, and the press of the shocking episode most likely dissipated over the course of nearly two years to a point where it no longer

assured the reliability of the assertion even for purposes of Louisiana's hearsay rules. Moreover, the statement constituted L.H.'s initial report of the sexual assault only from the state's perspective. It remained for jurors to determine whether her first report to the police, that two black boys had been involved, or to her mother, told the truth of the matter.

However, even assuming that the trial erred in admitting C.H.'s testimony, the ruling was clearly harmless. This Court has long held that the admission of hearsay testimony is harmless error when the effect is merely cumulative or corroborative of other testimony adduced at trial. *State v. Johnson*, 389 So. 2d 1302 (La. 1980); *State v. McIntyre*, 381 So. 2d 408, 411 (La. 1980). As this evidence was merely cumulative of the evidence provided in the videotaped statement of L.H. previously viewed by the jury, and L.H.'s testimony at trial, the admission of this evidence constitutes harmless error.

Finding no other errors in defendant's conviction and sentence, we now reach the seminal issue in this case.[22]

II. Capital Punishment for Non-Homicide Aggravated Rape

Looming over this case is the potential for the defendant to be the first person executed for committing an aggravated rape in which the victim survived since La. R.S. 14:42 was amended in 1995 to allow capital punishment for the rape of a person under the age of twelve. The defendant contends that Louisiana stands in a minority of jurisdictions in which

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[22] *See* the unpublished appendix to this opinion for a discussion of the numerous other assignments of error in this case.

legislatures have authorized capital punishment for the rape of a child not resulting in homicide[23] and predicts that La. R.S. 14:42 is unlikely to survive the scrutiny of the United States Supreme Court, whose decisions the defendant interprets as making it clear that the loss of life is the essential component which renders capital punishment a proportionate penalty under the Eighth Amendment.[24]

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[23] The defendant contends further that Louisiana is also among a minority of jurisdictions worldwide and claims the legislature, in amending La. R.S. 14:42 to authorize capital punishment for aggravated rape of a child under the age of twelve, violated Article 42 of the American Convention on Human Rights, to which this country is a signatory. However, in *Breard v. Greene*, 523 U.S. 371, 377, 118 S. Ct. 1352, 1355 (1998), the Supreme Court held that "[e]ven were [inmate's] Vienna Convention claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." Accordingly, this assignment of error lacks merit.

[24] The defendant also contends that La. Const. art. 1, § 20 provides additional requirements of proportionality beyond that imposed by the Eighth Amendment. La. Const. art.1, § 20 provides:

> § 20. Right to Humane Treatment
>
> Section 20. No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense.

In *State v. Perry*, 610 So. 2d 746 (La. 1992), we held that "[t]he framers of our state constitution clearly intended for this guarantee to go beyond the scope of the Eighth Amendment in some respects and to provide at least the same level of protection as the Bill of Rights and the Fourteenth Amendment and all others." Indeed, distinct from the Eighth Amendment, Art. 1, §20 expressly prohibits "euthanasia," "excessive" punishment, and "cruel *or* unusual" punishment. However, for purposes of capital punishment for child rape, we find this language does not provide any additional protections beyond those provided by the Eighth Amendment. Therefore, our analysis will proceed according to Eighth Amendment jurisprudence.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In *Weems v. United States,* the United States Supreme Court first discussed the Eighth Amendment as being "progressive, and . . . not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U.S. 349, 366-67, 378, 30 S. Ct. 544, 54 L. Ed. 793 (1910). Decades later, in *Trop v. Dulles*, the Supreme Court established that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630. (1958). This Eighth Amendment framework was further defined in *Gregg v. Georgia*, which held that a punishment is excessive and unconstitutional under the Eighth Amendment if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more that the purposeful and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (affirming the death sentence for first-degree murder). In *Coker v. Georgia*, discussed *infra*, the Court further explained:

> A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.

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433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977).[25]

Before 1977, aggravated rape was punishable by death in Louisiana. In 1976, the United States Supreme Court invalidated the death-penalty provision of Louisiana's aggravated-rape statute based on the notion that the imposition and carrying out of the death penalty for that crime constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Selman v. Louisiana*, 428 U.S. 906, 96 S. Ct. 3214 (1976). In 1977, the Court held that capital punishment for the rape of an adult woman violated the Eighth Amendment. *Coker, supra.*

The Louisiana Legislature again capitalized the crime of aggravated rape in 1995, but restricted it to the aggravated rape of a child under the age of 12 years, and provided for the punishment of "death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury." La. Acts 1995, No. 397, § 1, La. Acts 1997, No. 898 and 757; La. R.S. 14:42(D)(2).[26]

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[25] Later, in *Stanford v. Kentucky*, which held that executing an individual for crimes committed at 16 or 17 years of age did not violate the Eighth Amendment, the Court held that the Court's independent judgment had no bearing on the acceptability of a particular punishment under the Eighth Amendment. 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989). However, as discussed *infra*, *Stanford* was later overruled by *Roper v. Simmons, infra*, in which the Court also reaffirmed its view prior to *Stanford* that it must exercise its own independent judgment to determine whether the death penalty is a disproportionate penalty.

[26] Defendant was tried, convicted, and sentenced under this version of the law. However, Acts 2003, No. 795, § 1 substituted 13 years for 12 years in La. R.S. 14:42(A)(4), and Acts 2006, No. 178, § 1, substituted 13 years for 12 years in La. R.S. 14:42(D)(2) to change the penalty provisions to conform to the definition of the crime.

La. R.S. 14:42 provides in full:

§ 42. Aggravated rape

A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) When the victim resists the act to the utmost, but whose resistance is overcome by force.
(2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.
(3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon.
(4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.
(5) When two or more offenders participated in the act.
(6) When the victim is prevented from resisting the act because the victim suffers from a physical or mental infirmity preventing such resistance.

B. For purposes of Paragraph (5), "participate" shall mean:
(1) Commit the act of rape.
(2) Physically assist in the commission of such act.

C. For purposes of this Section, the following words have the following meanings:
(1) "Physical infirmity" means a person who is a quadriplegic or paraplegic.
(2) "Mental infirmity" means a person with an intelligence quotient of seventy or lower.

D. (1) Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.
(2) However, if the victim was under the age of thirteen years, as provided by Paragraph (A)(4) of this Section:
(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment may be capital shall apply.

In *State v. Wilson*, 96-1392 (La. 12/13/96), 685 So. 2d 1063, *cert. denied, Bethley v. Louisiana*, 520 U.S. 1259, 117 S. Ct. 2425, 138 L. Ed. 2d 188 (1997), in the context of pre-trial appeals by the state from the granting of motions to quash, this Court upheld the constitutional validity of the death penalty for the crime of aggravated rape when the victim is under 12 years of age.[27] In so doing, we distinguished the rape of a child from the United States Supreme Court's decision in *Coker, supra.* For while *Coker* clearly bars the use of the death penalty as punishment for the rape of an adult woman, it left open the question of which, if any, non-homicide crimes can be constitutionally punished by death. Because "children are a class that need special protection," we concluded that "given the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old." *Wilson, supra* at 1070. In distinguishing the *Wilson* case from *Coker*, we pointed out that the plurality in *Coker* "took great pains in referring only to the rape of adult women throughout their

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(b) And if the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

[27] The United States Supreme Court denied certiorari, with Justices Stevens, Breyer, and Ginsberg, concurring in the result but reiterating the principle that the denial of a "petition for writ of certiorari does not in any sense constitute a ruling on the merits . . ." To underscore the point, the dissenters noted "an arguable jurisdictional bar" to the Court's review because the defendant had been "neither convicted of nor sentenced for any crime" and thus the court did not have before it a final judgment of a state court for purposes of review as a matter of 28 U.S.C. § 1257(a). *Id.*

opinion," as being disproportionate to the death penalty, referring to an "adult woman" fourteen times. *Id.* at 1066.[28]

Wilson freely acknowledged at the outset that Louisiana stood alone at that time in providing the death penalty for child rape in which the victim does not die because other jurisdictions sharing similar views, *i.e.*, Tennessee, Florida, and Mississippi, had already struck down their laws for a variety of reasons. *Wilson*, 685 So. 2d at 1068. Nevertheless, on the premise that "[t]here is no constitutional infirmity in a state's statute simply because that jurisdiction [chooses] to be first," and taking into account that "[s]tatutes applied in one state can be carefully watched by other states so that the experience of the first state become available to all other states," the Court thereby left room for the possibility "that other states are awaiting the outcome of the challenges to the constitutionality of the subject statute before enacting their own." *Wilson*, 685 So.2 at 1069.

In the present case, however, unlike in *Wilson*, the issue is no longer hypothetical. For the first time since the enactment of Louisiana's present bifurcated capital sentencing scheme, the Court has before it a defendant condemned to death for a crime in which the victim did not die. The defendant predicts that Louisiana's aggravated rape statute will not survive federal scrutiny on the basis of a series of decisions, including *Coker*, in which death sentences for non-homicide offenses were set aside. *See Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed .2d 1140 (1982) (holding that the death penalty is an excessive penalty for a robber who does not take a human life); *Eberheart v. Georgia*, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 (1977) (holding that aggravated kidnapping did not warrant a

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[28] Incidentally, the victim in *Coker* was actually a sixteen-year-old married woman.

death sentence); *U.S. v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) (holding the death-penalty clause of the Federal Kidnapping Act unconstitutional).

In considering defendant's argument, we must address the question in the context of the Eighth Amendment analysis recently refined by the United States Supreme Court in the watershed decisions of *Atkins v. Virginia*, 536 U.S. 335, 122 S. Ct. 726, 151 L. Ed. 2d 670 (2001) (exempting mentally retarded persons from capital punishment) and *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 1 (2005) (exempting from capital punishment all defendants under the age of 18 years at the time of commission of a capital crime). *Atkins* and *Roper* reaffirm the Court's view that at its core the Eighth Amendment requires the Court to refer to "the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 561, 125 S. Ct. at 1190 (internal quotation marks and citation omitted). In making that determination, *Atkins* and *Roper* also reaffirmed the Court's view prior to *Stanford v. Kentucky, supra,* that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Roper*, 543 U.S. at 563, 125 S.Ct at 1191-92 (quoting *Atkins*, 536 U.S. at 312, 122 S. Ct. 2242 (quoting *Coker*, 433 U.S. at 597, 97 S. Ct. at 2868)). Thus, a bare majority of the prior Court subscribed to a two-part analysis under the Eighth Amendment:

> The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. This data gives us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment . . . .

Roper, 543 U.S. at 564, 125 S. Ct. at 1192. Both *Atkins* and *Roper* also looked to the frequency of the use of capital punishment where it is permissible as an objective indicia of consensus. This test has never been reconsidered or applied by the current Court and its new members.[29]

The first part of this test takes into account more than simply a numerical counting of which states among the 38 jurisdictions permitting capital punishment stand for or against a particular capital prosecution. The Court will also take into account the *direction* of change. In *Atkins*, the Court thus noted with respect to the number of states that had abandoned capital punishment for the mentally retarded following the Court's decision in *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (Eighth Amendment does not bar execution of the mentally retarded) (overruled by *Atkins*), "it is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins*, 536 U.S. at 315, 122 S. Ct. 2242. The Court thus attached particular significance to the number of states which adopted statutes precluding execution of the mentally retarded together with the failure of any state legislature to adopt the death penalty for the mentally retarded following the decision in *Penry*. *Atkins*, 536 U.S. at 315-16, 122 S. Ct. at 2249 ("Given the well-known fact that anti-crime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the

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[29] At least two current Justices, Scalia and Thomas, disagree that the meaning of the Eighth Amendment should be determined in accordance with the Court's "modern jurisprudence," which considers whether there is a "national consensus" that laws allowing certain executions "contravene our modern 'standards of decency,'" and they particularly object to the Court's exercise of its subjective independent judgment to determine the meaning of the Eighth Amendment. *Roper*, 543 U.S. at 608-09 (Scalia, J., dissenting, joined by Thomas, J. and Rehnquist, C.J.).

large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."). In *Roper*, the Court reinforced the importance of the direction of change to its analysis, finding the fact that five states (four through legislative enactment and one through judicial decision), that had allowed the death penalty for juveniles prior to *Stanford* now prohibited it, constituted a significant trend toward the abolition of the juvenile death penalty. The *Roper* Court then concluded that, "[a]s in *Atkins*, the objective indicia of consensus in this case —the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words of *Atkins* used respecting the mentally retarded, as 'categorically less culpable than the average criminal.'" *Roper*, 543 U.S. at 567, 125 S. Ct. at 1194.

The second part of the test, in which the Court will bring its own independent judgment to bear on the Eighth Amendment question, proceeds from the premise that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568, 125 S. Ct. at 1194 (quoting *Atkins*, 536 U.S. at 319, 122 S. Ct. at 2251). The Court will thus consider whether capital punishment for a particular class of offenders serves the twin social purposes of deterrence and retribution.[30] Although intentional murders

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[30] The Court buttressed its conclusion in *Roper* that death was disproportionate to the particular class of offender under consideration by taking into account the overwhelming weight of international opinion

unquestionably fall into the category of the most serious crimes, *Atkins* and *Roper* concluded that neither the mentally retarded nor juvenile offenders under the age of 18 years when they commit the crime can "with reliability be classified among the worst offenders." *Roper*, 543 U.S. at 569, 125 S. Ct. at 1195.[31] While the Court has exercised its independent

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disapproving of the death penalty for juvenile offenders. The Court thereby reaffirmed that reference "to the laws of other countries and to international authorities [is] instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Roper*, 543 U.S. at 575, 125 S. Ct. at 1198. The Court found it particularly instructive in *Roper* that the seven countries which had executed juvenile offenders besides the United States since 1990 (*i.e.* Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, Democratic Republic of Congo, and China) had all since then "either abolished capital punishment for juveniles or made public disavowal of the practice." *Roper*, 543 U.S. at 577, 125 S. Ct. at 1199. The Court thus deemed it "proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusion." *Roper*, 543 U.S. at 578, 125 S. Ct. at 1200.

Former Chief Justice Rehnquist rejected the Court's consideration of the sentencing practices of other countries in determining a national consensus for Eighth Amendment purposes, arguing that the Court in *Stanford v. Kentucky*, 492 U.S. 361, 391, n.1, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), explicitly rejected such consideration. *Atkins*, 536 U.S. at 325 (Rehnquist, C.J., dissenting); *Roper*, 543 U.S. at 622 (Rehnquist, C.J., dissenting).

[31] Intellectual deficits and adaptive disorders of the former, and a lack of maturity and a fully developed sense of responsibility of the latter, tend to diminish the moral culpability of the mentally retarded and juvenile offender, with important societal consequences. Retribution "is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity[,]" *Roper*, 543 U.S. at 571, 125 S. Ct. at 1196, or by reason of the "diminished capacities to understand and process information" of the mentally retarded. *Atkins*, 536 U.S. at 318-

judgment in *Coker* to determine that the rapist of an adult woman is not an offender who commits "'a narrow category of the most serious crimes' and whose culpability makes them 'the most deserving of execution,'" *Roper, supra*, 543 U.S. at 568, it has not yet analyzed whether the rape of a child under twelve falls in that category.

Thus, we must undertake the first part of the Supreme Court's Eighth Amendment test, analyzing the legislative enactments of other states that have addressed the issue. Since *Wilson*, four more states, Oklahoma, South Carolina, Montana, and Georgia, presently prescribe capital punishment for child rape. Two of the jurisdictions, Oklahoma and South Carolina, recently adopted their laws in 2006. Montana enacted a child rape capital punishment statute in 1997. These state statutes are more narrowly drawn than Louisiana, as all three require proof that the defendant previously had been convicted of sexual assault of a child before he becomes death eligible. *See* 10 Okl. St. Ann. § 7115(I) (2006 Supp); Mont. Code Ann. § 45-5-303; S.C. Code Ann. § 16-3-655(C)(I) (2006 Supp). Georgia has persistently reenacted its capital rape provisions, Ga. Code Ann. § 16-6-1(a)(1), although some 40 years have passed since the decision in *Coker*. The courts of that state readily acknowledge that while the offense remains classified as a capital crime for procedural purposes, the death penalty is not available when the victim is an adult woman. *Merrow v. State*, 268 Ga. App. 47, 601 S.E.2d 428 (2004).[32] However, in 1999, the Georgia legislature added

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19. For the same reasons, the mentally retarded and the juvenile offender "will be less susceptible to deterrence." *Roper*, 543 U.S. at 571, 125 S. Ct. at 1196; *see Atkins*, 536 U.S. at 320, 122 S. Ct. at 2251 ("[I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable . . . that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.").

[32] Thus, for some 40 years the Georgia courts have followed a classification theory similar to the one adopted by this Court for a few

subsection (1)(a)(2), which proscribes the carnal knowledge of a female less than 10 years old as a capital offense. *See State v. Lyons*, 256 Ga. App. 377, 568 S.E.2d 533, 535 (Ga. Ct. App. 2002). This statutory provision thus places Georgia in the ranks of those jurisdictions which provide capital punishment for the rape of a child which does not necessarily result in the death of the victim. Florida has retained capital child rape as a matter of statutory law but has not enforced it since 1981 following the decision in *State v. Buford*, 403 So. 2d 493 (Fla. 1981) which struck down the law in light of *Coker*. Thus, a stark analysis shows that of the 38 states allowing the death penalty, only 5 provide it for child rape.

However, the proportionality analysis question under the Eighth Amendment and the situation in the rest of the country is more complex. For in our view, and evidently the view of the United States Supreme Court,[33] child rape is the most heinous of all non-homicide crimes, and while the majority of other states may not provide capital punishment for child rape, many do provide capital punishment for other non-homicide crimes which are far less heinous. Thus, this analysis should look beyond the child rape penalty provisions of other states and instead should consider all non-homicide capital statutes to determine the national consensus for capital punishment in non-homicide cases.

Commentators taking opposite views in the debate spectrum over the question of death for child rape have

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years following the decision in *Furman v. Georgia*, 408 U.S. 237, 92 S. Ct. 2726 (1972). Under that approach, and despite the invalidity of the death penalty after *Furman*, capital cases remained "capital" for all procedural purposes, including the requirement of a unanimous 12-person jury. *State v. Holmes*, 263 La. 685, 269 So. 2d 207 (1972); *State v. Flood*, 263 La. 700, 269 So. 2d 212 (1972).

[33] *See Coker, supra*, 433 U.S. at 597 ("Short of homicide, [rape] is the ultimate violation of self.")

difficulty in agreeing which states among the 38 jurisdictions permitting capital punishment do or do not provide the death penalty for crimes which do not result in the death of the victim. *See* Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape States*, 45 Ariz. L. Rev. 198 (2003) (advocating capital child rape statutes); Joanna H. D'Avella, Note, *Death Row for Child Rape? Cruel and Unusual Punishment Under the Roper-Atkins "Evolving Standards of Decency" Framework*, 92 Cornell L. Rev. 129 (2006) (discussing Patrick Kennedy's case specifically and advocating the defense point of view); Ashley M. Kearns, *South Carolina's Evolving Standards of Decency: Capital Child Rape Statute Provides a Reminder That Societal Progression Continues Through Action, Not Idleness*, 58 S.C. L. Rev. 509 (2007).[34] However, most agree that the number

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[34] For example, Meister lists Missouri as a jurisdiction permitting non-homicide capital punishment. 45 Ariz. L. Rev. at 211, n. 131. However, Cornell places Missouri in the homicide-only categor D'Avella, *Note*, 92 Cornell L. Rev. at 130, n.6. On the other hand, Cornell lists Washington as a homicide-only capital jurisdiction while Meister correctly places it in the non-homicide category. *See* Wash. Rev. Code Ann. § 9.82.010 (West 2006 Supp) (treason). Kearns states that fourteen states allow the death penalty for non-homicide crimes. 58 S.C. La. Rev. 509, 520, n.9.

More importantly, for present purposes, Cornell lists Florida as among the states which provide capital punishment for the rape of a child. D'Avella, *Note*, 92 Cornell L. Rev. at 150, n. 152. In fact, Fla. Stat. Ann. § 794.011(2)(a) (West 2000), continues to provide that "[a] person 18years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony. . ." However, as this Court noted in *Wilson*, the Florida Supreme Court struck this provision down in *Buford v. State*, *supra* (applying *Coker*), and despite its nominal capital classification, child rape is punishable in Florida by a sentence of life imprisonment without parole. *Adawy v. State*, 902 So. 2d 746, 748 (Fla. 2005); *see* Fla. Stat. Ann. § 775.082 (West 2000) (in the event the death penalty in a capital felony is held unconstitutional by the United States Supreme Court or the Florida Supreme Court, the district court shall sentence the offender to life imprisonment without parole).

of jurisdictions allowing the death penalty for non-homicide crimes at least doubled between 1993 and 1997. Kearns, 58 S.C. L. Rev. at 520, 521, and n. 110 (citing Meister, *supra* note 108, at 210-212 and Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 Wm. & Mary J. Women & L., 129, 160-61 (1997) (noting that in 1993, at least six states authorized death for non-homicide crimes, and by 1997, that number had grown to fourteen)).

Our own survey, which also includes the 2003 Bureau of Justice Statistics report on capital punishment,[35] indicates that 24 of the 38 states permitting capital punishment provide the death penalty only for crimes resulting in the death of the victim. Of the remaining 14 states, 5 provide capital punishment for child rape, as discussed above. Five more provide the death penalty for sui generis extraordinary crimes against the government, i.e., treason, espionage, aircraft piracy. See Ark. Code Ann. § 5-51-201 (Michie 1997); Cal. Penal Code § 37 (West 1999); Miss. Code Ann. §§ 97-7-67, 97-25-55 (West 2003); N.M. Stat. Ann. § 20-12-42 (Michie 1989); Wash. Rev. Code Ann. § 9.82.010 (West 2006 Supp.).[36] Four states provide capital punishment for

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Nonetheless, Florida ranks among the non-homicide capital jurisdictions because of its strict drug laws. *See* Fla. Stat. Ann. §§ 893.135, 921-142 (*see infra* at p. 54a).

[35] U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 2003* at p.2 (Washington, DC: GPO 2004), http://www.ojp.usdoj.gov/6js/pub/pdf/cp03pdf (accessed February 21, 2007).

[36] However, the last execution for espionage and treason under state law occurred in 1862 in Texas. Federal law providing capital punishment for the same kinds of crimes all but preempts the field, *see, e.g.*, 18 U.S.C. § 794 (espionage); 18 U.S.C. § 2381 (treason), and even then, the last persons executed under federal law for espionage and treason were the Rosenbergs in 1953. *See*: http://en.wikipedia.org/wiki/Capital_punishment_in_the_United_States (accessed February 21, 2007).

aggravated kidnapping offenses similar to Louisiana's (non-capital) crime of aggravated kidnapping in R.S. 14:42. See Colo. Rev. Stat. Ann. § 18-3-301; Idaho Code, §§ 18-4502, 18-4504 (Michie 2000); Mont. Code Ann. 45-5-503 (West 2005); S.D. Codified Laws § 22-19-1 (Michie 1998). While it remains unclear why the legislatures in those states have felt free to prescribe capital punishment for a crime decapitalized by the Supreme Court in *Eberheart v. Georgia*, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 (1977) (per curiam citing *Coker*) when it does not result in the death of the victim, *Eberheart* may be read narrowly as a companion case of *Coker* (which it cites explicitly), as the crime involved a particularly brutal but non-lethal gang rape of a woman abducted at roadside as she attempted to fix a flat tire, *see Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12 (1974), and not as a broad statement that capital punishment may not be inflicted for a kidnapping which harms but does not kill the victim. In addition, three of the statutes are narrowly drawn and decapitalize the crime if the victim is released, before conviction of the offender (Colorado) or imposition of sentence (Idaho), or released unharmed at any time (Montana), to encourage the kidnapper to spare the victim's life. On the other hand, South Dakota imposes no such limits on its kidnapping law, thus making the crime more serious in that state than the rape of a child under the age of 10, a crime carrying a mandatory term of life imprisonment. S.D. Codified Laws §§ 22-22-1; 22-6-1 (Michie 1998). Despite the constitutional uncertainty of the laws,[37] these jurisdictions count in the survey of states which permit capital punishment for non-homicide crimes.

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[37] For example, in South Dakota, the crime of rape, involving either an adult woman or a child, becomes a capital offense if it also constitutes kidnapping as defined in § 22-19-1(2), *i.e.*, abduction "[to] facilitate the commission of any felony or flight thereafter. . ." However, exactly that scenario led to the decision in *Eberheart* and may prompt an identical response from the Supreme Court today.

Utah had made aggravated assault by a prisoner as a capital crime until the Utah Supreme Court struck the statute down in *State v. Gardner*, 947 P.2d 630, 653 (Utah 1997) ("We may or may not think the Supreme Court reached the right result in [*Coker*], but we do not see the persuasiveness of an argument that any aggravated assault, no matter how vicious, could be legally more reprehensible than any rape, no matter how brutal. And under *Coker*, no rape, '*with or without aggravating circumstances,*' can constitutionally qualify for the death penalty when death has not resulted.") (emphasis added by the court). Accordingly, in terms of which jurisdictions *presently* allow for at least the possibility of capital punishment for non-homicide crimes (apart from whether it is actually imposed), Utah no longer ranks among those states. However, a similar law in Montana remains in effect. Mont. Code Ann. § 46-18-220 (2005).

In spite of its decision in *State v. Buford*, *supra*, Florida remains among the ranks of non-homicide capital jurisdiction because of its sweeping drug laws which provide for capital punishment in extreme cases even when the offense does not result in the actual death of anyone. *See, e.g.* Fla. Stat. Ann. § 893.135(3) (West 2007 Supp) (importation of 300 or more kilograms of cocaine into the state when the offender "knows that the probable result of such importation would be the death of any person"); *see also* Fla. Stat. Ann. § 921.142(1) ("The Legislature finds that trafficking in cocaine or opiates carries a grave risk of death or danger to the public; that a reckless disregard for human life is implicit in knowingly trafficking in cocaine or opiates; and that persons who traffic in cocaine or opiates may be determined by the trier of fact to have a culpable mental state of reckless indifference or disregard for human life."). In effect, Florida has imported into its non-homicide drug laws the culpable mental state found sufficient by the Supreme Court to support a sentence of death in homicide cases. *See Tison v. Arizona*, 481 U.S.

137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987). Thus, 14 of the 38 states permitting capital punishment provide the death penalty for non-homicide crimes: Louisiana, Oklahoma, South Carolina, Georgia, Arkansas, California, Mississippi, New Mexico, Washington, Colorado, Idaho, Montana, South Dakota, and Florida.

At the federal level, of the 39 crimes carrying the death penalty, excluding the extraordinary crimes of treason and espionage, the overwhelming majority require the death of a person. However, 18 U.S.C. § 3591(b)(1) and 21 U.S.C. § 848(e) combine to provide capital punishment for the kingpin of an extraordinarily large continuing criminal drug enterprise.

Overall, it appears that approximately 38% of capital jurisdictions (15 of 39, including federal) authorize some form of non-homicide capital punishment, a showing strong enough to suggest that there may be no consensus one way or the other on whether death is an appropriate punishment for any crime which does not result in the death of the victim. However, when the direction of change is considered, clearly the direction is towards the imposition of capital punishment for non-homicide crimes. As stated earlier, the number of jurisdictions allowing the death penalty for non-homicide crimes more than doubled between 1993 and 1997.

Most important to our analysis is the fact that four states have enacted laws which capitalize child rape since *Wilson*, evidencing movement in the direction that this Court thought possible back in 1996 when *Wilson* was decided. Looked at another way, even after the Supreme Court decided in *Coker* that the death penalty for rape of an adult woman was unconstitutional, five states nevertheless have capitalized child rape since then, a number which the Supreme Court held in *Roper* was sufficient to indicate a new consensus regarding society's standards of decency towards the juvenile

death penalty. In fact, the trend is more compelling than in *Roper*, given the *Roper* Court's reliance on five states abolishing the death penalty for juveniles after *Stanford* held that the death penalty for juveniles was constitutional. Here, we have five states enacting the death penalty for child rape in spite of *Coker*, which held that the death penalty for rape of an adult was unconstitutional. Furthermore, it is likely that the ambiguity over whether *Coker* applies to all rape or just adult rape has left other states unsure of whether the death penalty for child rape is constitutional. These states may just be taking a "wait and see" attitude until the Supreme Court rules on the precise issue. Thus, the fact that only five states capitalize child rape should not pose an obstacle to the Court's consideration of the issue, given the direction of change, *i.e*, an increase of five since *Coker*.

Because of the direction of change towards the death penalty for child rape and given the lack of consensus either way when considering the number of capital jurisdictions that authorize the death penalty for non-homicide crimes (38%), in our view, the second stage of the *Atkins/Roper* analysis becomes relevant.

Whether child rapists rank among the worst offenders is largely an *a priori* judgment of whether the Eighth Amendment requires a bright-line rule of death only for death. The Supreme Court has characterized rape as a crime second only to homicide in the harm that it causes. *See Coker, supra*, 433 U.S. at 597 ("Short of homicide, [rape] is the 'ultimate violation of self.'") (quoting U.S. Dept. of Just., Law Enforcement Assistance Administration Report, Rape and Its Victims: A Report for Citizens Health Facilities and Criminal Justice Agencies (1975)). Given that characterization by the Court, it seems clear that if the Court is going to exercise its independent judgment to validate the death penalty for any non-homicide crime, it is going to be child rape.

While we cannot purport to exercise the Supreme Court's independent judgment on any matter, it can be said for child rapists as a class of offenders that, unlike the young or mentally retarded, they share no common characteristic tending to mitigate the moral culpability of their crimes. Contrary to the mentally retarded and juvenile offenders, execution of child rapists will serve the goals of deterrence and retribution just as well as execution of first-degree murderers would.[38] Our state legislature, and this Court, have determined this category of aggravated rapist to be among those deserving of the death penalty, and, short of first-degree murder, we can think of no other non-homicide crime more deserving. As we previously held in *Wilson:*

> Rape of a child under the age of twelve years of age is like no other crime. Since children cannot protect themselves, the State is given the responsibility to protect them. Children are a class of people that need special protection; they are particularly vulnerable since they are not mature enough nor capable of

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[38] We reject the defendant's policy arguments that commentators have speculated that the threat of capital punishment would encourage a rapist to murder his victim, that subjecting a child rape victim to a capital trial increases the trauma to the victim, and that there is an elevated likelihood of wrongful conviction in cases of rape when the victim is a child. Policy arguments tend to be facile, speculative, and political in nature. For each policy argument advanced by anti-capital punishment commentators, equally valid responses have been offered by pro-capital punishment commentators. *See, e.g.*, Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 Am. J. Crim. L. 105-12 (1997-1998). Thus, we consider these policy arguments to be largely irrelevant for Eighth Amendment purposes. Social policy arguments are for the legislature to consider, and whether a particular law represents good or bad policy has little bearing on the question of whether it is nevertheless constitutional. Further, as we stressed in *Wilson*, regardless of a victim's reluctance to come forward against a child rapist, children are a class of persons who need special protection.

> defending themselves. A "maturing society," through its legislature has recognized the degradation and devastation of child rape, and the permeation of harm resulting to victims of rape in this age category. The damage a child suffers as a result of rape is devastating to the child as well as to the community.[39]

Wilson, supra at 1067. We affirm that reasoning today and hold that the death penalty for the rape of a child under twelve is not disproportionate. Thus, we reject these assignments of error.

Defendant also argues that assuming that capital punishment is constitutional for child rape under the Eighth Amendment as discussed above, Louisiana's procedure for

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[39] As we further explained in *Wilson:*

> Contemporary standards as defined by the legislature indicate that the harm inflicted upon a child when raped is tremendous. That child suffers physically as well as emotionally and mentally, especially since the overwhelming majority of offenders are family members. Louisiana courts have held that sex offenses against children cause untold psychological harm not only to the victim but also to generations to come. "Common experience tells us that there is a vast difference in mental and physical maturity of an adolescent teenager . . . and a pre-adolescent child . . . It is well known that child abuse leaves lasting scars from generation to the next . . . such injury is inherent in the offense." *State v. Brown*, 660 So. 2d 123, 126 (La.App. 2 Cir.1995). ". . . Aggravated rape inflicts mental and psychological damage to its victim and undermines the community sense of security. The physical trauma and indignities suffered by the young victim of this offense were of enormous magnitude . . . ," *State v. Polkey*, 529 So. 2d 474 (La.App. 1 Cir.1988), ". . . the child's tender age made her particularly vulnerable and incapable of resisting . . . considering acutely deleterious consequences of conduct on an eight-year-old child." *State v. Jackson*, 658 So. 2d 722 (La.App. 2 Cir.1995). 685 So. 2d at 1070.

determining when child rape should result in a death sentence is unconstitutional because it does not ensure that it will not be imposed arbitrarily or capriciously.

La. R.S. 14:42, as it read at the time of trial, defined aggravated rape as "a rape committed upon a person, sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed. . . [w]hen the victim is under the age of twelve. . . ."[40] When the victim is under the age of twelve, La. R.S. 14:42(D)(2) authorizes the death penalty.[41] All other cases of aggravated rape are punishable by "life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence." La. R.S. 14:42(D)(1).

La. C.Cr.P. art. 905.3 provides:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be

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[40] As stated in footnote 26, *supra* at p. 32, La. R.S. 14:42(A)(4) was amended in 2003 to substitute 13 years for 12 years.

Aggravated rape also is where anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because (1) the victim resists the act to the utmost, but whose resistance is overcome by force, (2) the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution, (3) the victim is prevented from resisting because the offender is armed with a deadly weapon, (4) two or more offenders participated in the act, and (5) the victim is prevented from resisting the act because the victim suffers from a physical or mental infirmity preventing such resistance.

[41] As stated in footnote 26, *supra* at p. 32, La. R.S. 14:42(D)(2) was amended in 2006 to substitute 13 years for 12 years.

> imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating factors against aggravating factors, one against the other, according to any particular standard. *State v. Hamilton*, 92-1919 (La. 9/5/96), 681 So. 2d 1217, 1227-28; *State ex rel. Busby. v. Butler*, 538 So. 2d 164, 173-74 (La. 1988); *State v. Jones*, 474 So. 2d 919, 932 (La. 1985). The distinctive feature of Louisiana's capital sentencing law is that "[t]he jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court . . . but it must find a statutory aggravating circumstance before recommending a sentence of death." *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976) (also describing and upholding Georgia's sentencing provisions). The jury must consider and find one aggravating factor listed in La. C.Cr.P. art. 905.4 and must consider the mitigating factors listed in La. C.Cr.P. art. 905.5. Included as aggravating factors are that "the offender was engaged in the perpetration or attempted perpetration of aggravated rape," and the "the victim was under the age of twelve years . . . ." La. C.Cr.P. art. 905.4(A)(1) and (10).

Defendant argues that Louisiana's capital sentencing procedures fail to genuinely narrow the class of child-rapists eligible for the death penalty because 905.4 was designed solely to guide the jury's discretion in deciding which offenders guilty of first-degree murder are eligible for the death penalty and provides no basis by which juries can

determine which child rapists deserve the death penalty and which do not.

However, as we previously held in *Wilson*, the United States Supreme Court held in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988),[42] a death sentence does not violate the Eighth Amendment merely because the single statutory "aggravating circumstance" found by the jury duplicates an element of the underlying offense. To pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty" of the same crime. 484 U.S. at 244 (citing *Zant v. Stephens*, 464 U.S. 862, 877, 103 S. Ct. 2733, 2742, 77 L. Ed. 2d 235 (1983)). *Lowenfield* held:

> the narrowing function required for a regime of capital punishment maybe provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

Id., 484 U.S. at 246. Accordingly, the Court held that "the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm." *Id.*

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[42] In *Lowenfield*, the issue was whether a sentence of death may validly rest upon a single aggravating circumstance under La. C.Cr.P. art. 905.4 that is a necessary element of the underlying offense of first-degree murder under La. R.S. 14:30.1. The Court answered in the affirmative.

Thus, under *Lowenfield*, the narrowing function may either be done in the underlying statute itself, in this case La. R.S. 14:42, or in the sentencing statute, La. C.Cr.P. art. 905.4, and the fact that the aggravating circumstance, *i.e.*, victim under the age of 12, duplicates and element of the crime, victim under the age of 12, does not invalidate the statute. As found by *Lowenfield* in the context of murderers, "the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more." *Id.*, 484 U.S. at 246.

The reasoning of *Lowenfield* plainly applies to Louisiana's sentencing scheme for capital rape.[43] This assignment of error lacks merit.[44]

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[43] In fact, the present capital rape sentencing scheme as amended in 2003 actually does allow for narrowing at the sentencing phase as well, as the underlying statute narrows those child rapists eligible for the death penalty to those who rape children under 13, and the sentencing statute provides as an aggravating factor that the child be under 12.

[44] We note that the author of this opinion concurred in *Wilson*, writing separately to express his view that "the Legislature should immediately amend Articles 905 *et seq.* of the Code of Criminal Procedure (especially Article 905.2) to clarify the sentencing procedure for an aggravated rape case in which the death sentence may be imposed." *Wilson, supra* at 1074 (Victory, J., concurring). This was directed at the fact that La. C.Cr.P. art. 905.2, which governs capital sentencing hearings, provided that "[t]he sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and *the impact that the death of the victim has had on the family members*." (Emphasis added.) The statute had no provisions for a capital case where the victim survived. This statute was amended by Acts 2001, No. 280, § 1 to provide for this and now reads "The sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that *the crime has had on the victim*, family members, friends, and associates. *The victim* or his family members, friends and associates may decline to testify but, after testifying for the state, shall be subject to cross-

III. Capital Sentence Review

Under La.C.Cr.P. art. 905.9 and Supreme Court Rule XXVIII, this Court reviews each death sentence imposed by the courts of this state to determine if it is constitutionally excessive. In making its determination, the Court considers whether the sentence was imposed under the influence of passion, prejudice, or other arbitrary factors; whether the evidence supports the jury's finding with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender.

The district judge submitted a Uniform Capital Sentence Report and Capital Sentence Investigation Report as Supreme Court Rule XXVIII requires. Those documents reveal that the defendant is a black male who was 34 years of age when he committed the instant aggravated rape in March of 1998 and is currently 43 years old. The defendant has two dependent stepchildren, a stepdaughter age 14 (the victim of the instant offense) and a stepson age 10. The Sentence Report reflects that his father predeceased him in 2000 and his mother is still living. The Sentence Report indicates that the highest grade completed was eighth grade. This report also lists the defendant as being the half-brother to a son born of his mother, half-brother to two sons from his father, and half-brother to a sister from his father. The Sentence Report reveals that no psychiatric evaluation was made to determine sanity but that the defendant was interviewed by psychologists to determine if he is mentally retarded, and the district court determined that he was not. *See* discussion in the

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examination." (Emphasis added.) Thus, the concerns the author had in 1996 have now been rectified.

appendix to this opinion. There was testimony in a pre-trial hearing that the defendant completed his GED.

Portions of the Capital Sentence Report and the Investigation Report reveal the defendant had five prior convictions for issuing worthless checks between 1987-1992. The instant capital offense involves the March 2, 1998, aggravated rape of his step-daughter who was under the age of 12 years old at the time (age 8). There was testimony presented during the penalty phase that Kennedy also raped a child, now an adult, in 1984, but that he was never charged or convicted of this offense.

Passion, Prejudice and Other Arbitrary Factors. In capital cases the Court has heightened responsibility to determine whether argument introduced passion, prejudice, or other arbitrary factors which contributed to the jury's sentencing decision. The discussion of the various alleged instances of prejudicial prosecutorial comments, gruesome photographs and expert testimony regarding the extent of the injuries, and the victim's emotional display on the stand set forth instances which the defendant claims interjected of passion, prejudice, and other arbitrary factors into these proceedings. These claims are discussed and rejected in the appendix. For the reasons set forth in the discussion of each of these assignments of error, we find that there is nothing to establish passion, prejudice, and/or other arbitrary factors were interjected into these proceedings in such a way that they contributed to the jury's decision that the defendant should suffer the death penalty.

Aggravating Circumstance. As discussed above, the state introduced sufficient evidence to prove the presence of the aggravating circumstance of aggravated rape of a victim under the age of twelve years old. That this aggravating circumstance is the same as an element of the charged offense

is discussed above, and does not merit reversal of the defendant's conviction and sentence.

Proportionality. This Court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offender and the offense. In this case, the state attempts to meet its obligations under Rule XXVIII by submission of a memorandum dealing with seventy-seven cases, purporting to catalog all first-degree murder cases in the 24th Judicial District Court in which sentence was imposed after January 1, 1976. The state also catalogs each capital rape case in which sentence was imposed after August 15, 1995, in the same judicial district. In five of the cases involving aggravated rape of a juvenile, the state opted not to seek capital punishment.[45] In two cases, prosecution was instituted as a capital case but defendants pled guilty and received life sentences. In two of the capital rape cases, the defendants were convicted but the jury did not unanimously vote to impose capital punishment during the penalty phase. Because this is the first time the death penalty has been imposed under Louisiana's revised aggravated rape law, there are no similar cases. However, the heinous nature of the crime and the severity of the injuries sustained by the victim distinguishes this case from aggravated rape cases in which the death penalty is either not requested or not imposed. In addition, we have held above that the death penalty in this case is not disproportionate under the Eighth Amendment.

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[45] In one case, the state opted not to seek the death penalty because the sexual abuse spanned the period within which the aggravated rape statute was amended.

DECREE

For the reasons assigned herein, the defendant's conviction and death sentence are affirmed. In this event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial court shall, upon receiving notice from this Court under La. C.Cr.P. art. 923 of finality of direct appeal, and before signing the warrant of execution, as provided by La. R.S. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any State post-conviction proceedings, if appropriate, pursuant to its authority under La. R.S. 15:149.1; and (2) to litigate expeditiously the claims raised in that application, if filed in the state courts.

AFFIRMED.

APPENDIX B

SUPREME COURT OF LOUISIANA
No. 05-KA-1981

STATE OF LOUISIANA
v.
PATRICK KENNEDY

On Appeal from the Twenty-Fourth Judicial District Court, For the Parish of Jefferson, Honorable Ross LaDart, Judge

NOT FOR PUBLICATION

VICTORY, J.*

The defendant's remaining assignments of error are without merit and are addressed below in the order they arose in the proceedings.

Pre-Trial Grand Jury Proceedings

The defendant contends that discrimination in the selection of the grand jury foreperson requires reversal of the conviction. This claim was previously presented to this Court by writ application from the decision of the Fifth Circuit in *State v. Kennedy*, 02-0214 (La. App. 5 Cir. 3/4/02), 823 So. 2d 411, *writ denied*, 02-2088 (La. 1/24/03), 836 So. 2d 43, in which the Fifth Circuit analyzed the case in light of this Court's decision in *State v. Langley*, 95-1489 (La. 4/3/02), 813 So. 2d 356.[1] The court of appeal correctly found that the

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*Retired Judge Lemmie O. Hightower, assigned as Justice ad hoc, sitting for Associate Justice Jeannette T. Knoll, recused.

defendant failed to establish a prima facie case of discrimination in the selection of the grand jury foreperson.[2] The instant appeal adds no new considerations for review.

Voir Dire

The defendant contends prospective jurors with prior felony convictions, who had served their sentences, were

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[1]As noted by the appellate court, *Langley* found an unrebutted prima facie case of discrimination when African-Americans were under represented by an absolute disparity of 15.5% to 15.9% and women by 25.4%. Here, on the other hand, the absolute disparity for African-Americans, which ranged from 7.12% to -0.78%, was far below the figures presented in *Langley*. However, the absolute disparity figures for women in the instant case, 13.4% to 17.21%, "all partially within the *Langley*-III range as significant." *Kennedy*, 823 So. 2d at 416. In *Langley*, the absolute disparity for women was 25.4%. Nevertheless, when reviewing the comparative disparities figures in the present case, females were under represented 29% to 32% of the time, whereas in *Langley*, the comparative disparity amounted to 48.5% for women. *Kennedy*, 823 So. 2d at 419. Given the borderline under representation of women, the improvement in the selection process, the large size of the population segment, and the small comparative disparity, the Fifth Circuit concluded that the defendant failed to establish a prima face case of discrimination in the selection of grand jury forepersons in Jefferson Parish. *Kennedy*, 823 So. 2d at 419-420.

[2] To demonstrate an equal protection violation in the context of grand jury selection, a defendant must establish a prima facie case of purposeful discrimination by showing:

(1) under representation of an identifiable group in the grand jury that returned the indictment; (2) that the degree of under representation must be proved "by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time;" and (3) that the selection process is "subject to abuse or is not racially neutral" so as to support the presumption of discrimination raised by the statistical showing. *Castaneda v. Partida*, 430 U.S. 482, 494-95, 97 S. Ct. 1272, 1280, 51 L. Ed. 2d 498. Only if a defendant established a prima facie case of discrimination using this approach would the burden shift to the state to rebut that prima facie case. *Id.*

wrongfully disqualified by the Clerk of Court in Jefferson Parish.

La. C.Cr.P. art. 401 sets out the general qualifications for jurors in Louisiana. No one under indictment for a felony, nor anyone having been convicted of a felony for which he has not been pardoned is eligible to serve as a juror. La. C.Cr.P. art. 401(5). In Louisiana, the initial qualifications of individuals to serve as jurors are determined before their names are placed on the general venire lists. La. C.Cr.P. art. 408 (parishes other than Orleans); La. C.Cr.P. art. 409 (Orleans Parish). Defendant contends that the provisions of La. C.Cr.P. art. 401(5) are unconstitutional, as they conflict directly with La. Const. art. I, § 20, which provides for the right to humane treatment:

> No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense.

In the defendant's view, the right to sit on a jury is a full right of citizenship that shall be restored upon the completion of a criminal sentence.

However, this Court has recognized that the restoration of the full rights of citizenship under Article I, § 20 restores only the basic rights of citizenship, such as the right to vote, work or hold public office, but does not restore privileges as a first offender pardon under La. Const. art. IV, § 5(E)(1) does. *State v. Adams*, 355 So. 2d 917, 922 (La. 1978). Likewise, an automatic pardon for a first felony offender under Article IV, § 5(E)(1), while restoring some privileges, does not restore the status of innocence to the convict who has merely served out his sentence as does an executive pardon granted by the governor. *Adams*, 355 So. 2d at 922; *Diaz v. Chasen*, 642

F.2d 764, 766 (5th Cir. 1981). Moreover, La. C.Cr.P. art. 401(5) specifically provides that in order for a person to qualify as a juror they must "not be under indictment for a felony, nor have been convicted of a felony for which he has not been pardoned." *See State v. Hall*, 233 So. 2d 541 (La. 1970). Absent a pardon from the governor, a person convicted of a felony in Louisiana is not qualified to serve as a juror. *State v. Baxter*, 357 So. 2d 271, 273 (La. 1978).

Article V, § 33(A) of the Louisiana Constitution provides: "A citizen of the state who has reached the age of majority is eligible to serve as a juror within the parish in which he is domiciled. The legislature may provide additional qualifications." The legislature was well within its constitutional authority in instituting the qualifications in La. C.Cr.P. art. 401. The defendant's contentions in these assignments of error are contrary to settled law.

The defendant also complains of several other rulings made by the district court during voir dire. The defendant contends that prospective jurors Lange and Subramaniam were improperly excused for cause based only on a general opposition to capital punishment. The defendant also complains that prospective jurors Butler, Howell, and Scheid were improperly excused for cause based only on a general belief that capital punishment is disproportionate to the offense of aggravated rape. The defendant contends that the district court improperly excused prospective African-American jurors Dorsey, Parkman, Martinez, Manson, and Payton for hardship, and prospective jurors Lespinasse and Jones based on youth. The defendant also contends the district court improperly denied defense challenges for cause of prospective jurors Augustus and Asfour. Finally, the defendant contends the district court improperly restricted the scope of voir dire.

To determine the correctness of such rulings, a review is

undertaken of the record of the voir dire as a whole. *State v. Lee*, 93-2810(La. 5/23/94), 637 So. 2d 102, 108; *State v. Hall*, 616 So. 2d 664, 669 (La. 1983) (citing *State v. Williams*, 457 So. 2d 610 (La. 1984)). The record has been scrutinized and the jury selection process summarized briefly below, with those prospective jurors complained of by the defendant appearing in **bold** typeface.

Voir dire commenced on August 8, 2003. The jury pool was first examined for basic qualifications, then "death qualified," and then subjected to general voir dire.[3] 39 prospective jurors were excused by the district court *without objection* for failing to meet basic qualifications: 5 were not citizens residing in the jurisdiction;[4] 3 reported difficulty reading or writing;[5] 11 expressed health concerns that rendered them physically and/or mentally unable to serve;[6] 11 were excused for family, school, or work-related hardship;[7] 7

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[3] Although defense counsel agreed to this procedure, the defendant himself objected that he believed asking prospective jurors to assume guilt hypothetically to inquire into their views on capital punishment would bias them against him *ab initio*.

[4] These included prospective jurors Montgomery, Morales, Serio, **Lespinasse**, and Richardson. The reasons for excusing prospective juror Lespinasse were not fully jurisdictional but interrelated with his attendance of high school. After the trial judge explained basic juror qualifications and other prospective jurors voiced their jurisdictional concerns, Lespinasse volunteered that, although his family resided in Jefferson Parish, he attended boarding school at the high school level outside the parish during most of the preceding year and was still in high school.

[5] These included prospective jurors Bustillo, Moore, and Robertson.

[6] These included prospective jurors Berthelot, Wallace, Wade, **Martinez**, Stoll, Roussel, Lee, Roach, Burghardt, Bodden, and Chopin. In addition to these, three prospective jurors were excused for poor health over the defense's objection: Rogers, Reech, **Dorsey**.

[7] These included prospective jurors Thibodeaux, Smith, Lizano, Dykes,

had personal experience with sexual abuse or other concerns resulting in partiality;[8] and 2 had personal familiarity with an aspect of this case.[9] Prior to "death qualification," two prospective jurors were successfully challenged for cause by the state without objection,[10] three prospective jurors were successfully challenged for cause by the defense without objection,[11] and three prospective jurors were jointly challenged successfully for cause.[12]

During "death qualification," 16 prospective jurors were successfully challenged for cause *without objection* because they would not consider life imprisonment as a punishment for an offender proved to have raped a child (reverse-*Witherspoon*)[13] and 43 prospective jurors were successfully challenged for cause *without objection* because they would not consider capital punishment either generally[14] or for an

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Oddo, Howard, Briede, Vela, Ardoin, Trosclair, and Fernandez.

[8] These included prospective jurors Carey, Pennino, Canizaro, Heyer, Buquoi, Bennet, and Unger.

[9] These were prospective jurors Johnson and Day.

[10]These were Duhe and Smith. In addition to these, four prospective jurors were successfully challenged for cause by the state over the defense's objection: Martin, **Parkman**, **Manson**, and **Payton**.

[11]These were Smith, Reyes, and Smoot. Two of defendant's challenges for cause were denied (**Asfour** and Ripp) and one of the defendant's challenges for cause was granted over the state's objection (Lacheny).

[12]These were Kavanaugh, Kenney, and Brignac. One joint challenge for cause was denied (**Augustus**).

[13]These were Kummerer, Martinez, Jackson, Kravet, Coulon, Rogers, Moore, Thomas, Lachney, Estes, Godin, Wilson, Michel, Arceneaux, Deibel, and Folse.

[14] These were Williams, Rousell, Cunningham, Hollister, Kenning, Leaumont, Carriere, McGee, Lopez, Pulizzano, Clark, Nguyen, Hahn,

offense of aggravated rape[15] (*Witherspoon*). Following "death qualification," the state's challenge for cause based on family hardship was granted for five prospective jurors without objection,[16] and the state and defense joined in one challenge for cause.[17]

By August 14, 78 jurors were found to have been qualified, had survived *Witherspoon* and reverse-*Witherspoon* challenges, and progressed to general voir dire. During general voir dire, two joint challenges for cause were granted,[18] three state challenges for cause were granted without objection,[19] and one defense challenge for cause was granted without objection.[20] Following general voir dire, peremptory challenges were made and the jury selection process completed. The district court judge gave an additional two peremptory challenges (to be used to strike prospective

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Arcement, Matthews, Wick, Williams, Babin, Delahoussaye, Hoang, Jacobs, Vincent, Klotz, Funck, St. Germain, and Quinn. In addition to these, the state's *Witherspoon* challenge for cause was granted over the defense's objection for prospective juror **Subramaniam**.

[15] These were **Howell**, **Butler**, **Scheid**, Buckman, Ohlsson, Wells, Boudreaux, Davis, Harrison, Rowen, Bonura, Landry, Sibley, Sanchez, Avery, Digiacomo, and Logan. The state's *Witherspoon* challenge for cause of Waguespack was denied.

[16] These were Griffiths, Feurtado, Collins-Jones, Shuckrow, and Blissett. In addition, the state's challenges for cause for prospective jurors **Jones** and Brady were granted over the defense's objection.

[17] This prospective juror was Nixon. The state's challenge for cause of prospective juror **Lange** was granted over the defense's objection.

[18] Prospective jurors Cheron and Fleming had some pre-existing knowledge of the crime.

[19] These were prospective jurors Carey, Ripp, and Lorens.

[20] This was prospective juror Blum.

alternate jurors) for a total of fourteen peremptory challenges for each side. The state exercised nine of its peremptory challenges,[21] which included one back-strike.[22] The defense exercised 11 of its peremptory challenges,[23] which included seven back-strikes.[24] Twelve jurors[25] and two alternates[26] were finally selected.

Lange. The district court granted the state's challenge for cause of this prospective juror. Defendant contends that ruling was in error because Lange expressed only a general opposition to capital punishment but indicated that he would consider both life and death based on the brutality of the offense and, despite some general knowledge about the case, he understood and would apply the presumption of innocence.

In fact, Lange initially indicated on his juror questionnaire that he generally opposed capital punishment but that he could put aside his feelings and impose it according to the facts and the law. He explained further on questioning by the state during "death qualification" that his view on the appropriateness of capital punishment would depend on the brutality of the crime. The defense had no

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[21] The state struck peremptorily prospective jurors Bolton, Rodriguez, Harper, K. Martinez, Yochum, Vincent, Franklin, and one unknown prospective juror.

[22] The state back-struck prospective juror B. Martinez.

[23] The defense struck peremptorily prospective jurors Ryan, Asfour, Guidry, and Sachitano.

[24] The defense back-struck Williams, Finney, Allemore, Flynn, Sheehan, Badeaux, and Marcus.

[25] These were Hezeau, Uhl, Vo, Wise, Doucet, Dufrene, **Augustus**, Servat, Hanley, Harris, Dubois, and Cavallo.

[26] These were alternates Murry and Broders.

further questions for him. Neither side objected to this prospective juror at the close of the "death qualification" process. During the general voir dire questioning that followed, Lange volunteered when the district court judge inquired into whether any prospective jurors were aware of the publicity surrounding this crime or had heard any media reports. Lange indicated that he heard that the stepfather had brutally raped the child and that there had been a search through the Woodmere neighborhood. Although Lange initially stated that he had not formed an opinion whether the stepfather was guilty, he indicated upon further probing by the district court judge that he believed the defendant, who was likely identified correctly by the victim, was obliged to present some evidence to restore his tarnished reputation. At that point, the district court instructed Lange on the presumption of innocence and the Fifth Amendment.

The state contended in challenging prospective juror Lange for cause that, although he indicated (after being instructed by the district court), that he would apply the proper legal standard regarding the burden of proof, the totality of his answers combined with his initial statements, including his knowledge gleaned from media reports, indicated that he believed the defense had to present evidence to prove the innocence of the defendant. The district court judge agreed and granted the state's challenge for cause over the objection of the defense.

A trial court is vested with broad discretion in ruling on challenges for cause, and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *State v. Cross*, 93-1189, pp. 6-7 (La. 6/30/95), 658 So. 2d 683, 686-87; *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So. 2d 1278, 1280. The grounds for which a juror may be challenged for cause are set forth in La. C.Cr.P. art. 797. One of these grounds is pertinent here, namely, that "[t]he juror is not impartial, whatever the cause

of his partiality, . . ." *Id.* § (2). A trial court is not bound by a juror's assurances of impartiality, and a cause challenge should be granted if a juror's responses as a whole reveal facts from which bias, prejudice or inability to render fair judgment may be inferred reasonably. *State v. Hallal*, 557 So. 2d 1388, 1389-90 (La. 1990) (per curiam); *State v. Jones*, 474 So. 2d 919, 926 (La. 1985). As a general matter, under La. C.Cr.P. art. 800(B) a defendant is precluded from attacking a trial court's grant of a state's challenge for cause unless the effect of such ruling is the exercise by the state of more peremptory challenges than it is entitled to by law.

Under these circumstances, the district court did not abuse its discretion in granting the state's challenge for cause. The trial judge makes personal observations of potential jurors during the entire voir dire, and a reviewing court should accord great deference to the trial judge's determination and should not attempt to reconstruct voir dire by microscopic dissection of transcript in search of magic words or phrases that automatically signify juror's qualification or disqualification. Despite this prospective juror's ability to respond correctly after being instructed, the overall tenor of his answers indicate that his awareness of facts of the case as reported by the media would substantially impair his performance as a juror. The defendant fails to show that the trial judge abused his discretion in granting the state's challenge for cause of prospective juror Lange. Moreover, the defendant has made no showing that the effect of this ruling was the exercise by the state of more peremptory challenges than it was entitled to by law. As noted above, the state exercised only 9 of its 12 peremptory challenges.

Subramanian. The state's *Witherspoon* challenge for cause was granted over the defense's objection for this prospective juror. The defendant contends that this ruling was in error because, although Subramanian opined that capital punishment was costly and ineffective and likely

disproportionate for rape, he indicated that he could consider it albeit at a very high standard of proof. Although the state had remaining peremptory challenges and could exclude the juror in any event, a defendant may complain that the trial court erroneously excused a potential juror who is *Witherspoon* eligible, although the state could have used a peremptory challenge to strike the juror. *Gray v. Mississippi*, 481 U.S. 648, 664, 107 S. Ct. 2045, 2054, 95 L. Ed. 2d 622 (1987); *Davis v. Georgia*, 429 U.S. 122, 97 S. Ct. 399, 50 L. Ed. 2d 338; *State v. Edwards*, 97-1797 (La. 7/2/99), 750 So. 2d 893, 903-04.

In fact, this prospective juror began the "death qualification" process by stating that he was generally opposed to capital punishment because he considered it expensive, ineffective, and uncivilized. Upon further questioning, he indicated that he believed death was a disproportionate punishment for the rape of minor; he would only seriously consider it in a case of mass murder. He conceded that his views on capital punishment would impair his ability to serve fairly and impartially. In response to further questioning by the defense, this prospective juror clearly stated that, assuming the state had met its burden of proof in the guilt phase, during the penalty phase he would revisit such guilt-phase issues as witness credibility and physical evidence, in effect requiring the state to prove its case at a higher standard than beyond a reasonable doubt because it was a capital case.

A prospective juror is properly excluded for cause because of his/her views on capital punishment when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 852, 83 L. Ed. 2d 841 (1985); *State v. Sullivan*, 596 So. 2d 177 (La. 1992), *rev'd on other grounds sub nom. Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct.

2078, 124 L. Ed. 2d 182 (1993). The basis of exclusion under La. C.Cr.P. art. 798(2)(b), which incorporates the standard of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d. 776 (1968), as clarified by *Witt*, is that the juror's views "would prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath." *Witherspoon* further dictates that a capital defendant's rights under the Sixth and Fourteenth Amendments to an impartial jury prohibits the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.*, 88 S. Ct. at 1777.

A review of the record demonstrates that the trial judge did not abuse his discretion in granting the state's challenge for cause of Subramanian on the basis of his views on capital punishment. Although this prospective juror indicated that he could consider imposing the death penalty under extremely limited circumstances, it is clear that this juror's views exceed a general objection to the death penalty or conscientious or religious scruples against its infliction, and rose to the level of substantially impairing his ability to make an impartial decision in accordance with his instructions and his oath. If a prospective juror's inclination for or against the death penalty would substantially impair the performance of the juror's duties. a challenge for cause is warranted. *State v. Ross*, 623 So. 2d 643, 644 (La. 1993). Although this prospective juror declared his ability to remain impartial, his responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may reasonably be inferred. The juror's voir dire responses as a whole make it clear that his reluctance to impose the death penalty translated into requiring "absolute" proof of guilt, rather than proof beyond a reasonable doubt. His views on capital punishment therefore would substantially impair his performance as a juror. He was properly excluded.

Dorsey, Parkman, Martinez, Manson, and Payton. The defendant contends that African-American jurors were improperly excluded for health reasons, which reasons the defendant implies were not sufficiently severe to vitiate their ability to serve. Of these prospective jurors, defense counsel did not object to excusing Martinez.[27] Of the remaining four, each of whom voluntarily approached the bench to inform the court of his or her ill-health during the initial qualification process, all suffered significant impairments clearly rendering them unable to serve. Dorsey complained of neck pain, inability to engage in prolonged sitting, trouble with walking and standing as a consequence of recent ankle surgery, and drowsiness resulting from pain medicine. Parkman suffered from rheumatoid arthritis, experienced difficulty in sitting, laying, or standing, and endured pain in her shoulder, neck, and legs. She frequently urinated as a consequence of diabetes, takes numerous medications, and indicated that the pain she suffers would impair her ability to concentrate.[28] Manson reported a significant memory impairment: he would forget mundane things after 15-20 minutes elapsed and would forget even significant information after a week. Payton reported taking approximately 15 different medications and suffering from drowsiness and frequent uncontrolled urination.

The trial court is authorized to excuse a person from jury service either before or after selection to the general venire or jury pool if such service would result in undue hardship or extreme inconvenience. The court is permitted to take this

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[27] Moreover, Martinez suffered from scoliosis and reported, *inter alia*, inability to sit for more than 10 or 15 minutes.

[28] The trial judge noted, following the defense's objection, that this prospective juror's condition appeared severe and that she wore numerous braces.

action on its own initiative or on the recommendation of an official or employee designated by the court. *See* La. C.Cr.P. art. 783(B); *State v. Brown*, 414 So. 2d 726, 728 (La. 1982). The trial court is vested with broad discretion in excusing prospective jurors for undue hardship. *State v. Ivy*, 307 So. 2d 587, 590 (La. 1975). The discretion to release prospective jurors in advance of voir dire examination is not to be disturbed unless there is a showing of fraud or collusion resulting in prejudice to the accused. *State v. Sheppard*, 350 So. 2d 615, 650 (La. 1977). A review of the transcript of voir dire shows that these jurors were properly excused for ill health.

Lespinasse. The defendant contends that Lespinasse was excused because he was 18 years old. However, this prospective juror was excused not only without objection but apparently by agreement of both sides.[29]

Jones. The defendant contends that Jones was excused for youth although she ultimately indicated that she could consider both life and death. In fact, this prospective juror initially stated during "death qualification" that she could consider capital punishment for homicide but would not for an aggravated rape under any circumstances. Upon further questioning by the defense, she indicated that she had changed her mind and "would have an open mind to both sides." Following "death qualification," the court noted that Jones appeared to have been rehabilitated, the state agreed, and no challenge was made. Jones then approached the bench to indicate that she did not believe she was sufficiently mature to serve as a juror on this case. The state challenged her for

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[29] Setting aside the fact that the defense agreed to the release of this prospective juror and assuming that this boarding school student could be considered to reside in the jurisdiction, full-time students are not a protected class and "the young" are not a group requiring protection for purposes of jury composition jurisprudence, as discussed below.

cause and the defense objected. The trial court attempted to rehabilitate her. She remained obdurate that she would be unable to make a decision and that any decision she made would be based, not on the facts and the law, but rather based on her fear.

Although the law prohibits systematic exclusion of certain protected classes in the source or sources from which the jury venires are chosen, "the young" have never been held to be a group which requires protection under its fair cross-section analysis. *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 2917, 41 L. Ed. 2d 590 (1974) (upholding a system for jury selection which guaranteed that the youngest juror at the time of trial could be no younger than 24). As noted above, Jones was considered rehabilitated by the state until she voluntarily expressed her fear that she was not sufficiently mature to participate in a capital trial and stated that she would not be able to make a decision based on the law and the evidence. Under the circumstances, there was no abuse in the grant of this challenge for cause of a juror who insists that, because of her own immaturity, she cannot make a decision based on the law and the evidence.

Augustus. The district court denied a joint challenge for cause of this juror. The defendant contends that his challenge for cause of this prospective juror was improperly denied and that he exhausted all of its peremptory challenges, forcing it to accept this juror, who would only vote for death, on the jury. However, as noted above in the summary of voir dire, a review of the transcript makes it abundantly clear that the defense did not exhaust all of its peremptory challenges.[30]

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[30] When this juror first made the jury, the defense had exercised only five of its peremptory challenges. When the 12th member of the jury was accepted, the defense had exercised 11. In his supplemental brief, the defendant concedes that subsequent correction of the record results in a revision to the number of peremptory challenges utilized, which the defendant contends in his reply brief shows that the record is so defective

The trial judge, in addition to affording each side two extra challenges for use in selecting alternates, repeatedly vocalized the number of challenges remaining for each side throughout the selection process. Appellate counsel's claim that the record is unclear in this regard, later withdrawn in his reply brief, is patently in error.

A trial court is vested with broad discretion in ruling on challenges for cause and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *State v. Cross*, 93-1189 (La. 6/30/95), 658 So. 2d 683, 686-87; *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So. 2d 1278, 1280. Prejudice is presumed when a challenge for cause is denied erroneously by a trial court, and the defendant has exhausted his peremptory challenges. *Robertson*, 630 So. 2d at 1280; *State v. Ross*, 623 So. 2d 643, 644 (La. 1993).[31] But when a defendant has failed to exhaust his peremptory challenges, this Court has held that such a failure bars review. *See State v. Mitchell*, 94-2078, (La. 5/21/96), 674 So. 2d 250, 254 (juror allegedly would not consider mitigating evidence and would weigh against defendant a failure to testify; this Court "need not reach . . .

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as to undermine confidence in it.

[31]The rule is different at the federal level. *See United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from district court's erroneous denial of a cause challenge). However, at the federal level, a defendant may seat the challenged juror and then complain about the trial court's ruling denying the cause challenge on appeal if convicted. *Martinez-Salazar*, 528 U.S. at 315, 120 S. Ct. at 781. In Louisiana, a defendant must use one of his remaining peremptory challenges to excuse the juror or waive any complaint on appeal. *State v. Connolly*, 700 So. 2d at 818; *State v. Bourque*, 622 So. 2d 198, 229-30 (La. 1993); *State v. Fallon*, 290 So. 2d 273, 282 (La. 1974).

whether there was an erroneous denial of [a cause] challenge," because defendant struck the juror and had peremptories remaining at the close of jury selection), *cert. denied*, 519 U.S. 1043, 117 S. Ct. 614 (1996); *State v. Koon*, 96-1208 (La. 5/20/97), 704 So. 2d 756, 757 (juror held fast to belief in defendant's guilt; Court need not decide whether the challenge for cause was improperly denied, "[b]ecause the defense failed to use all its peremptory challenges . . .").

As noted above, the state exercised 9 and the defense 11 of its peremptory challenges. Regarding this particular juror, following "death qualification" both state and defense joined in challenging this juror for cause. In denying this joint challenge, the trial court described this juror as a weather vane who was easily manipulated by the questions into expressing both pro-death and pro-life leanings. A review of her full testimony shows that this assessment is accurate. She initially indicated that she favored capital punishment in general but could consider both death and life in prison depending on the circumstances of the offense and the evidence presented. However, after defense questioning, she appeared to commit her vote to death. The attorneys approached the bench and the trial court commented that the defense had taken a prospective juror who would consider both options and, by "piling on enough facts," obtained a commitment from her. The trial judge commented further:

> My concern is, is that both, all four of you know how when you keep piling on facts with a witness who's already shown a lean[ing], a predisposition, you can virtually lead that person right to where you want that person to be or not want them to be. But, what have you accomplished? My concern is you've never really accomplished that fact that he's incapable or she's incapable of considering both sides. You've just given them a set of facts which drives them right to where their lean is.

After this hiatus, this prospective juror was asked whether she could consider any penalty other than death for the rape of a child and she indicated that she would also consider a life sentence. Under these circumstances, there appears no abuse of discretion in refusing to excuse this juror for cause, who was apparently perceived as objectionable to each side, when neither exhausted its peremptory challenges. This mode of questioning by defense counsel, however, is exemplary of the type of questioning ultimately restricted by the district court, which defendant contends (as discussed below) unduly restricted his right to conduct a full voir dire of the prospective jurors.

Asfour. The defendant contends that his challenge for cause of this prospective juror, who knew someone who had been molested as a child rendering her partial, was improperly denied. In fact, Asfour first volunteered during the "death qualification" process that she had not included on her juror questionnaire that she knew someone who was molested at age 12. She was questioned further about this by defense counsel after which she remained committed to considering both life and death. She survived "death qualification" and then approached the court to note that she is a single parent of a six-year-old child whose father is serving in Iraq. The court inquired into her child care arrangements. Following general voir dire, the defendant challenged this prospective juror for cause because she was one of two prospective jurors who expressed concern that the defendant had access to their personal information on the jury questionnaires. The trial court inquired to determine whether she had formed any opinions about the defendant, and because she had not, denied the challenge. It is only in this context that the defense objected to the denial of its challenge for cause of this prospective juror. Therefore, the argument raised on appeal, that this prospective juror knew a child sex abuse victim and therefore was biased, was not properly preserved for review.

Butler. The defendant contends this prospective juror indicated that, although he considered capital punishment a disproportionate penalty for rape, he would consider imposing it under some circumstances. However, the state's challenge for cause of Butler was granted without objection by the defense. Therefore, this issue has not been preserved for review.[32]

Howell. The defendant contends that this prospective juror indicated that she could only consider capital punishment for a rape that resulted in the death of the victim. However, the state's challenge for cause of this prospective juror was granted without objection by the defense. Therefore, this issue has not been preserved for review.[33]

Scheid. The defendant contends that although the record suggests that defense counsel challenged this prospective juror, it seems more likely that the state would have challenged this prospective juror who would not consider capital punishment if the victim of the offense lived to testify. However, assuming arguendo that appellate counsel's theory is correct and the names of the prosecuting and defense attorney were reversed during transcription, then the defense did not object to the challenge for cause of this prospective juror and this issue has not been preserved for review.[34]

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[32]Moreover, Butler made it clear that he would never consider capital punishment in a case of aggravated rape of a child victim but only in an extreme case of serial rape. Therefore, this prospective juror was properly excluded under *Witherspoon*.

[33] Moreover, Howell clearly indicated that she absolutely would never vote for capital punishment in the case of the aggravated rape of a child victim. Therefore, she was properly excluded under *Witherspoon*.

[34] Moreover, although Scheid's initial statements were confused, when pressed to imagine a situation in which he would be able to consider capital punishment for an aggravated rape that did not result in homicide,

Scope of voir dire. Finally, the defendant contends the district court improperly restricted the scope of voir dire during the "death qualification" process, which prevented the defense from fully exploring prospective jurors' views on capital punishment.

The transcript of voir dire has been reviewed to see the extent of restrictions placed on defense counsel. In addition to those described above, the transcript shows a limitation was placed on defense during voir dire of prospective juror Finney,[35] who indicated some preference for capital punishment in the case of the rape of a 12-year old. Upon further questioning Finney testified he could consider a life sentence despite his first preference for capital punishment. After this questioning, the defense added an additional hypothetical condition by probing how the juror would respond if he learned that the defendant had raped another girl previously. The court intervened, finding that the defense had sufficiently probed the prospective juror's ability to consider the alternatives. Likewise, a similar scenario occurred during *Witherspoon* questioning on the next day. On both occasions, defense counsel argued that it was necessary to present prospective jurors with the precise factual circumstances of the case to determine whether they would be able to consider both sentencing options under those circumstances. The trial court limited defense counsel a third time during the voir dire of prospective juror Unger.[36] The defense, who wished to

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he could only imagine a scenario in which the victim were his own daughter (although he conceded that he would not be able to serve on that jury). *Id.* at p. 2882. He said he would find it extremely difficult to consider capital punishment for a non-homicide rape even when the defendant had been shown to have committed prior rapes. *Id.* Therefore, the *Witherspoon* challenge was clearly properly granted.

[35] This prospective juror was ultimately back-struck by the defense.

[36] This prospective juror was excused by the trial court without objection.

continue questioning her about the impact of her grandchildren on her decision-making process, argued that her demeanor showed that she would be substantially impaired from performing her duty as a juror. The trial court, however, considered the questioning repetitive and calculated to end up with a commitment to a verdict.

As a general matter, an accused in a criminal case is constitutionally entitled to a full and complete voir dire examination. La. Const. Art. I, § 17. The purpose of voir dire is to determine the qualifications of prospective jurors by testing their competency and impartiality and to assist counsel in articulating intelligent reasons for exercise of cause and peremptory challenges. *State v. Stacy*, 96-0221(La. 10/15/96), 680 So. 2d 1175, 1178; *see also State v. Burton*, 464 So. 2d 421, 425 (La. App. 1 Cir.), *writ denied*, 468 So. 2d 570 (La. 1985). The scope of voir dire is within the sound discretion of the trial court and its rulings will not be disturbed on appeal absent a clear showing of an abuse of discretion. Review of a trial judge's rulings on voir dire should be accomplished by examination of the whole record to determine whether sufficiently wide latitude was afforded the defendant in examining prospective jurors. *Burton*, *supra*, 464 So. 2d at 425.

The record as a whole shows that the trial judge acted with an even hand, spending extensive time attempting to rehabilitate jurors, and conducted voir dire in an equitable manner. The trial judge afforded the defense a full opportunity to conduct its voir dire and only appears to have restricted the defense when its questions became repetitive, badgering, or an attempt to inquire too deeply into the prospective juror's response to the specific facts of the case to be tried. In this regard, a trial judge must adhere to the fine line separating a proper inquiry into the ability of a juror to

consider both death and life imprisonment under the particular facts of the case, *see State v. Watson*, 449 So. 2d 1321, 1330 (La. 1984) ("If [a prospective juror] knows enough about the case to know that she could not consider the imposition of the death penalty regardless of what evidence might be presented, she must be excused."), and an improper use of hypothetical questions to pry into the juror's opinion concerning evidence that may be offered at trial. *State v. Vaughn*, 431 So. 2d 358, 360 (La. 1983); *State v. Square*, 257 La. 743, 244 So. 2d 200, 226 (1971); *State v. Smith*, 216 La. 1041, 45 So. 2d 617 (1950). The defendant has shown no abuse of the trial judge's discretion.

Pre-trial motions

The defendant contends the trial court erred in denying a defense motion to hold a pre-trial hearing to assess the competency of the victim to testify at trial. The defendant contends the victim's videotaped statement, her testimony at a pre-trial *Prieur* hearing, and her testimony at trial shows that her memory for, and understanding of, the relevant events was extremely limited. Defendant alleges the victim's young age and limited capacity rendered her particularly suggestible and that her recollections were therefore easily tainted by leading questions asked during interviews and the expectations of representatives of the state throughout the investigatory process.

On July 14, 2003, the defendant filed a Motion to Assess Witness' Competency to Testify, seeking a pre-trial hearing for the purpose of assessing L.H.'s competency to testify as a witness at the trial in this matter, claiming that the December 16, 1999, videotaped interview of the victim revealed that her recollection of specific details of the event was impaired.

On July 17, 2003, the trial court denied the motion, finding that the victim had previously demonstrated her

competency when she testified before the trial court on April 7, 2000, at a *Prieur* hearing as follows:

> Alright. In reviewing the transcript given by L.H. on April 7, year 2000, and in reviewing the applicable law, I'm not inclined to grant the Defendant's Motion. The Defendant in this case asks me to test the competency of L.H. She is thirteen years of age as we speak, if my calculations are correct. She was eight years of age when the rape allegedly occurred, for which Defendant is charged. Your motion asks that the events-argues rather that the events which she is being asked to recall occurred at an age in which her competency to testify surely would have been at issue, and that her reported memory of those events is vague and spotty, casting doubt on her credibility as a witness. And I think that's a quote almost verbatim from your motion.
>
> It is the Court's appreciation that understanding, not age, is the test of whether a person is competent to be sworn as a witness. And that the key determination to be made in determining the competency of a witness is whether—in this case [L.H.] was able to discern the difference between truth and falsehood. In other words, competency is not the same as testing a witness' memory or lack thereof [and] in my judgment is clearly an issue for the jury to decide.
>
> If you're asking me to test whether or not [L.H.] was competent at age eight, I certainly decline to make that determination. Because I don't have and couldn't have the benefit of knowing how she would have responded to questioning five years ago.
>
> I have a transcript. And the transcript made for interesting reading. And I don't mean that in the

perjuritive [sic] sense. The young lady was able to state her full name, her date of birth, names of family members, as well as the names of the street and the neighborhood that she lived in previous to the time of the alleged rape for which your client has been charged. And I note and made a list of the following questions put to her by Mr. Armato. Question: "L.H., do you always tell the truth?" Answer: "No." Question: "Mr. Bates asked you whether you knew the difference between what the truth is and what a lie is; do you?" Answer: "Yes." Question: "Why don't you tell us what the truth is and what a lie is." Answer: "A lie is when somebody believes something and they don't tell what they did to you." Question: "When somebody does something and when they don't tell what they actually did to you?" Answer: "When somebody do something and they don't tell what they actually did." Question: "All right. They tell something different than what they actually did?" Answer: "Yes." Question: "Okay. What is the truth when somebody does something?" "They tell what they did."

I found it also interesting that no one, that is no one from the State nor the Defense, and the Court for that matter, put the issue of competency before the Court at that particular time. We just proceeded right on through testimony, assuming that the young lady was competent to testify.

I think that the Defense established clearly in my mind that she knew the difference between a truth and a falsehood. And what sort of underscored that point in my mind was that she readily admitted that she didn't always tell the truth; of which I'm sure the Defense found interesting. Perhaps not as interesting for the State.

> She had a sound understanding of these concepts. Unless you can show me today some circumstances that have manifested themselves between that testimony in April of 2000 and today that would cause me to concern myself about her competency to testify—unless you can do that today, your Motion is denied.

The state argues that the trial judge is vested with great discretion in determining whether a witness is competent to testify and adds further that when the witness testified at the pre-trial hearing, the witness testified competently and the defense did not challenge her competency to testify. The state notes further that for the first time on appeal the defendant is alleging that the witness was incompetent because she was suggestively questioned. Finally, the state contends that the defense waived this issue when it did not object to the admissibility of the videotape.

Every person of proper understanding is competent to be a witness except as otherwise provided by legislation. La. C.E. art. 601. Understanding, and not age, is the test of whether any person shall be sworn as a witness. *State v. Francis*, 337 So. 2d 487, 489 (1976). The determination by the trial court that a child is competent to testify as a witness is based not only upon the child's answers to questions testing his understanding, but also upon the child's overall demeanor on the witness stand. *State v. Humphrey*, 412 So. 2d 507, 516 (La. 1981). The determination as to whether a child has sufficient understanding to testify is entitled to great weight because the trial court has the advantage of seeing and hearing the witness. *State v. Edwards*, 419 So. 2d 881, 890 (La. 1982). Therefore, the trial court is vested with broad discretion in determining the competency of child witnesses, and on appeal its ruling is entitled to great weight and will not be disturbed in the absence of manifest error. *State v.*

Arnaud, 412 So. 2d 1013, 1018 (La. 1982). This Court has upheld the competency determinations of four-year-old witnesses under circumstances which vouched for the reliability of the child's testimony. *Arnaud*, 412 So. 2d at 1018; *State v. Noble*, 342 So. 2d 170, 172 (La. 1977).

In addition to holding that the trial court decides questions of competence of child witnesses and exercises great discretion in doing so, *see e.g.*, *State v. Foy*, 439 So. 2d 433, 435 (La. 1983), Louisiana jurisprudence holds that the same deferential standard which applies to a district judge's determination of competency of a child witness likewise applies to the judge's decision as to the method by which he will determine that competence. The predecessor to Art. 601 required the judge to examine the witness. *See* former R.S. 15:469. However, the code now allows for the judge to make his determination without an examination.

The key determination to be made was whether the child is able to understand the difference between truth and falsehoods. *See State v. Doss*, 522 So. 2d 1274, 1279 (La. App. 5 Cir. 1988). The trial judge explicitly made such a determination. The defendant has made no showing that the trial court's decision was manifestly erroneous. La. C.Cr.P. art. 930.2. As the district court ruled on July 17, 2003, in denying the defendant's motion to assess the witness's competency, he had previously observed that the victim was competent when she testified at a *Prieur* hearing on April 2, 2000, and the defense had put forth no evidence that her competency had changed since that time. Further, at trial, the jury observed the victim's inability to recall certain details during cross-examination, as well as the paucity of detail in the videotaped interview in which she accuses the defendant. The trier of fact makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony of any witness; thus, a reviewing court may impinge on the "fact finder's discretion only to the extent necessary to

guarantee the fundamental due process of law." *State v. Mussall*, 523 So. 2d 1305, 1310 (La. 1988).

Considering the deferential standard which applies to a district judge's determination of competency of a child witness, as well as that applied to a judge's decision as to the method by which he will determine that competence, the defendant's complaints lack merit. In addition, to the extent that the defendant now claims that he should have been allowed the opportunity to test the witness's competency prior to the admission at trial of the December 16, 1999, videotape, the defendant clearly waived that right as he did not request to at that time and instead freely stipulated to the admissibility of the tape. La. C.C.P. art. 841.

Trial Delayed Disclosure of Exculpatory Evidence

The defendant complains that the state delayed in disclosing exculpatory evidence. Specifically, the defendant contends the state withheld: (1) test results from the Connecticut crime lab which were unable to identify the source of blood found on the underside of the mattress or mattress pad (which were not discovered by the defense until trial), (2) the videotaped interview of March 7, 1998, in which the victim stated that the defendant did not rape her (which was not disclosed until 1999), and (3) records documenting phone calls placed from the defendant's home on the morning of the rape (which were not provided to the defense until February 1, 2000). The defendant contends that if he had timely received all of this exculpatory evidence, he could have asserted his right to a speedy trial and been tried before the production of the victim's 1999 videotaped statement taken by Amalee Gordon when, the defendant contends, the evidence would have been insufficient to support the conviction. Finally, the defendant contends that when the Connecticut report surfaced for the first time during trial, the defense should have been granted a mistrial or given

opportunities to pursue more vigorously its theory that the state had deliberately concealed this evidence.

The state responds that the Connecticut lab results were inconclusive and therefore not exculpatory and that the defense did not rely on these results but obtained independent testing that ruled out the victim as the source of blood on the mattress pad. In addition, on February 1, 2000, the defense acknowledged receipt of the 1998 videotaped interview; however, the state alleges that the defense was aware of this interview as early as August 28, 1998. Regardless, the state contends that the defense was not prejudiced by receiving the videotape three years before trial. Likewise, the state alleges that the defense received the phone records three years before trial. Further, the state contends that the fact that the defense opted not to introduce the phone records at trial indicates that this evidence was not deemed exculpatory by the defense.

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused after receiving a request for it violates a defendant's due process rights where the evidence is material either to guilt or punishment, without regard to the good or bad faith of the prosecution. *Id.*, 373 U.S. at 87, 83 S. Ct. at 1196-97. The *Brady* rule encompasses evidence which impeaches the testimony of a witness when the reliability or credibility of that witness may be determinative of guilt or innocence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 756, 31 L. Ed. 2d 104 (1972); *State v. Knapper*, 579 So. 2d 956, 959 (La. 1991). Still, *Brady* and its progeny do not establish a general rule of discoverability. A prosecutor does not breach his constitutional duty to disclose favorable evidence "unless the omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs*,

427 U.S. 97, 112, 96 S. Ct 2392, 2400, 49 L. Ed. 2d 342 (1976); *State v. Willie*, 410 So. 2d 1019, 1030 (La. 1982).

While the Supreme Court has repeatedly emphasized the duty of the prosecution to disclose material exculpatory evidence, *see e.g. Taylor v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), it has never involved itself in the timing of such disclosures. In that respect, this Court has noted broadly that "the late disclosure as well as the non-disclosure of exculpatory evidence can so prejudice a defendant that he is deprived of his constitutional right to a fair trial." *State v. Williams*, 448 So. 2d 659, 665 (La. 1984). This standard appears elastic enough to sanction a deliberate delay of disclosure to protect witness safety as long as the defendant's opportunity to investigate the evidence and prepare to exploit it is not substantially impaired. *See United States v. Higgs*, 713 F.2d 39, 43-44 (9th Cir. 1983) ("That inquiry in turn depends on what information has been requested and how that information will be used by [the defendants]. No denial of due process occurs if Brady material is disclosed to [defendants] in time for its effective use at trial.").

Not every violation of the discovery procedures requires reversal; before the defendant may complain of the violation, he must establish that prejudice resulted. *State v. Hooks*, 421 So. 2d 880, 886 (La. 1982); *State v. Strickland*, 398 So. 2d 1062, 1067 (La. 1981). When a defendant is lulled into a misapprehension of the strength of the state's case through the prosecution's failure to disclose timely or fully, and the defendant suffers prejudice when undisclosed evidence is used against him, basic unfairness results which constitutes reversible error. *State v. Mitchell*, 412 So. 2d 1042, 1044 (La. 1982); *State v. Davis*, 399 So. 2d 1168, 1171 (La. 1981). Regardless, discovery violations generally do not provide grounds for reversal of a conviction and sentence unless they have actually prejudiced the defendant; even a discovery

violation involving the state's failure to disclose exculpatory evidence does not require reversal as a matter of the Due Process Clause unless the non-disclosure was so serious that there exists a reasonable probability that the suppressed evidence would have produced a different verdict. *State v. Garrick*, 03-0137 (La. 4/14/04), 870 So. 2d 990, 993.

The defendant must show here that the state's untimely disclosure of the Connecticut laboratory report, the victim's statement, and his phone records deprived him of an opportunity to place before the jury all evidence relevant to the credibility of the witness's testimony and thereby "'undermines confidence in the outcome of trial.'" *State v. Walter*, 96-1702 (La. 6/20/97), 695 So. 2d 1340 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995)). The defendant is least able to make such a showing in the case of the laboratory report and the phone records. The Connecticut laboratory report was inconclusive and ultimately of no evidentiary value. Despite this, the district court collected voluminous testimony outside the presence of the jury to determine why the defense had not been timely provided with a copy of the report, but was unable to conclude anything more than that something had clearly gone wrong with the process. Regardless, the defense had the same material tested and was able to rule out the victim as the source of the bloodstain, rendering the evidence irrelevant to the instant case.

Regarding the defendant's own phone records, the government is not obligated to furnish the defendant with information he already has or can obtain. *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988) (government is not obligated to furnish defendant with information he already has or can obtain with reasonable diligence); *United States v. Miranne*, 688 F.2d 980, 987 (5th Cir. 1982) ("Under *Brady*, the government is not obligated to furnish a defendant with information which he already has."). Accordingly, no *Brady*

violation occurred. *See State v. Hobley*, 99-?343, p. 25 n.10 (La. 12/8/99), 752 So. 2d 771, 786 ("There is no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available from another source, because in such cases there is really nothing for the government to disclose.") (quoting *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998)). It appears that although the defense had the records in time for trial, defense counsel preferred not to introduce them and instead argued during closing that the highly chaotic morning of the rape produced discrepancies between the computer records and memories and that the jury should consider the fallibility of human memory.

Although the videotaped interview conducted by Dr. McDermott was clearly exculpatory and therefore its delayed discovery more troublesome, the defendant fails to show it was prejudiced by receiving the videotaped interview approximately three years before trial. In fact, the defendant made this interview the centerpiece of his case. The defendant's contention on appeal that if he had known about the existence of the videotape earlier, he could have proceeded to trial at an earlier date (in which there allegedly would have been insufficient evidence), requires foreknowledge that the victim would recant her original statement and later make a statement implicating the defendant, which the defendant could not have anticipated. This argument is wholly speculative.

In all three instances, the defendant has shown no prejudice in the delayed disclosure that resulted in basic unfairness rising to the level of reversible error.

Mental Retardation Defense

The defendant contends the trial court erred in precluding

a defense of mental retardation, based on his failure to cooperate with expert evaluation and the prospective application of legislatively pending La. C.Cr.P. art. 905.5. The defendant disputes that he failed to cooperate sufficiently with the court-appointed experts, alleging that although he resents being considered mentally retarded he cooperated throughout their evaluations.[37] The defendant contends further that the stigma associated with the label of mental retardation renders mentally retarded defendants particularly vulnerable to the risk of being executed in violation of *Atkins*, *infra,* and that the court below should have chosen a less severe remedy than barring the proof of his mental retardation to the jury.

The state responds that jury selection was completed and opening statements made on the same day the enactment of La. C.Cr.P. art. 905.5.1 in 2003 La. Acts 698, became effective: August 15, 2003.[38] In response to the defendant's motion, the district court found the testimony of the defense's expert sufficient to justify the appointment of a commission to evaluate the defendant in accordance with this Court's decision in *State v. Williams*, 01-1650 (La. 11/1/02), 831 So. 2d 835. Based on the commission's opinion, the district court

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[37]The state responds that a court-appointed expert made three trips to jail to interview the defendant and that the defendant refused to speak with him until the third and never complied with any form of testing.

[38]In response to *Atkins*, La. C.Cr.P. art. 905.5.1 provides that no person who is mentally retarded shall be subjected to a sentence of death. The statute further provides that any capital defendant who claims to be mentally retarded must file written notice within the time limits for filing pre-trial motions. La. C.Cr.P. art. 905.5.1((B). In addition, the statute provides that mental retardation is to be tried to the jury during the capital sentencing hearing. La. C.Cr.P. art. 905.5.1(C)(1). The state contends that this act, containing as it does provisions requiring pre-trial notice, would apply necessarily only to those cases in pre-trial posture at the time of its effective date. Therefore, the state contends that this Court's decision in *Williams* was the governing law.

found that the defendant failed to show he was mentally retarded by a preponderance of the evidence. The state also implies that the defense opted during the penalty phase to depict the defendant instead as a productive, positive, and functioning member of society rather than trying to place evidence before the jury that would show impairment in defendant's adaptive functioning.

In *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), the United States Supreme Court held that execution of mentally retarded persons constitutes an excessive punishment and thus violates the Eighth Amendment. However, the Supreme Court declined to adopt a uniform definition of mental retardation, and instead, left the task of defining mental retardation to the states. *Id.*, 536 U.S. at 317, 122 S. Ct. at 2250. This Court addressed *Atkins* in *State v. Williams*, *supra* at 861, and directed trial courts in post-*Atkins* hearings:

> 1) to order a pre-trial evidentiary hearing on the issue of mental retardation when the court has 'reasonable grounds' to believe a defendant is mentally retarded, [La. C.Cr.P.] art. 643; 2) to hold the hearing before a judge, not a jury; 3) to require the defendant to prove by a preponderance of the evidence that he meets the criteria established in Louisiana's statutory definition of mental retardation, LSA-28:381 [defining retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period"].

In response to both *Atkins* and *Williams*, the legislature enacted 2003 La. Acts 698, which created La. C.Cr.P. art. 905.5.1. The recently enacted article, which took effect on August 15, 2003, provides for a procedure to be used in the

event that a defendant raises a claim of mental retardation and requires proof of the allegation of mental retardation by a defendant in a capital case before the jury unless the state and defendant agree that the issue is to be tried by the judge. In all likelihood, however, a jury determination of mental retardation is not required for the statute to survive constitutional scrutiny. In fact, in *Williams*, we addressed that very issue and opined:

> The Supreme Court would unquestionably look askance at a suggestion that in *Atkins* it had acted as a super legislature imposing on all of the states with capital punishment the requirement that they prove as an aggravating circumstance that the defendant has normal intelligence and adaptive function. *Atkins* explicitly addressed mental retardation as an exemption from capital punishment, not as a fact the absence of which operates "as the functional equivalent of an element of a greater offense."

Id., 831 So. 2d at 860, n.35 (quoting *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 2443, 153 L. Ed. 2d 556). Moreover, in *Apprendi v. New Jersey*, the Supreme Court distinguished those findings which would increase punishment and thus required a jury determination and proof beyond a reasonable doubt and those facts that reduce punishment, which are not required to be submitted to a jury, stating:

> If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum, by showing for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that

> authorized by the verdict according to statute nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone.

530 U.S. 466, 490, n. 16, 120 S. Ct. 2348, 2363 (2000). *See also* Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. Legis. 77, 208 (2003) ("[I]t does not appear that the Court's holdings in *Apprendi* and *Ring* require a jury determination regarding the *Atkins* mental retardation issue.").

In fact, both commentators and appellate courts have expressed serious reservations about jurors deciding the issue of mental retardation at the penalty phase of capital trials. *See* Tobolowsky, *supra*, p. 109 ("[P]lacing the *Atkins* mental retardation determination within the punishment proceeding could be confusing to jurors who might misconstrue it as interrelated with the culpability issues before them or otherwise to be balanced with or against such issues."); *Murphy v. State*, 54 P.3d 556, 575-77 (Okla. Crim. App. 2002) (Chapel, J. concurring in result) (at penalty phase determination of mental retardation, jurors resolution of issue may be improperly influenced by evidence that "can only improperly appeal to jurors' emotions and passions"). Accordingly, several states actually require the court to make the determination of whether a defendant is mentally retarded before trial. *See* Ariz. Rev. Stat. § 13-703.02; Colo. Rev. Stat. § 18-1.3-1102; Ind. Code Ann. § 35-36-9-1; Ky. Rev. Stat. Ann. § 532.135; S.D. Codified Laws 23-A-27A-26.1 to .7. Twenty-one of the thirty states that have enacted procedures for determining mental retardation for those accused of capital offenses provide for a pre-trial determination by a judge. However, perhaps in an abundance of caution following *Ring*, other jurisdictions with large death row populations have adopted statutory schemes whereby the jury must determine whether a defendant has established that he is mentally retarded and thus ineligible for execution. *See e.g.*,

Va. Code Ann. § 19.2-264.3:1.1(C) ("In any case in which the offense may be punishable by death and is tried before a jury, the issue of mental retardation, if raised by the defendant in accordance with the notice provisions . . . shall be determined by the jury as part of the sentencing proceeding . . ."); N.C. Gen. Stat. § 15A-2005(c) issue of mental retardation shall be submitted to the court pre-trial only with the consent of the state) N.C. Gen. Stat. §15A-2005(c) (court shall submit issue of mental retardation to jury at sentencing).

Emphasis has been placed on discussing the legitimacy of a judicial determination of whether a defendant is mentally retarded and therefore protected from capital punishment by *Atkins,* because that is essentially what occurred in the instant case, despite the efforts of defense counsel to make it appear that the defendant was prevented from litigating this issue. The defense first interjected the question of defendant's mental status in April, 2003, when it filed a motion to stay all proceedings pending action on several bills submitted to the legislature in response to *Atkins*. Counsel had previously submitted to the court ex parte information which they believed supported a finding that defendant is mentally retarded. The trial court denied the motion to stay the proceedings but agreed to hold a hearing on whether reasonable grounds existed for appointing a sanity commission to delve into defendant's mental status. At the hearing conducted on May 1, 2003, Dr. Marc Zimmerman, a psychologist and well-known defense expert on a variety of mental heath topics including mental retardation, *see, e.g.*, *State v. Dunn*, 01-1635 (La. 11/1/02), 831 So. 2d 862, 877, testified that on the basis of objective tests administered to defendant in jail, he had determined that defendant has an I.Q. of 70, on the cusp of mild mental retardation. The doctor was inclined to that diagnosis but refrained from giving a firm opinion because he had not had the time to assess whether the defendant suffered from multiple adaptive skills impairment, as suggested by poor school performance and placement in

special education, or whether the signs of mental retardation had manifested themselves before defendant was 18 years old. On the basis of Dr. Zimmerman's testimony, the trial court appointed a commission composed of Drs. Hannie and Griffin to examine the defendant and determine whether he is mentally retarded.

The trial court began the hearing conducted on the commission's report, June 27, 2003, by denying a renewed motion by the defense to postpone the matter until after the effective date of the pending *Atkins* legislation. The court further noted that it was proceeding by analogy with a sanity commission and first heard testimony from Dr. Thomas Hannie, a clinical psychologist. Dr. Hannie testified that he had made three trips to the jail; on the first two occasions, the defendant refused to speak to him, although on the second trip the doctor had brought counsel with him to smooth the way; however, on the third occasion, May 27, 2003, the defendant agreed to speak with him but flatly refused to take any tests.

Dr. Hannie had found no indicia of mental retardation in the defendant's school records.[39] Dr. Hannie had also reviewed defendant's writing samples, which this expert considered to have been produced at the level of an average high school graduate.[40] According to Dr. Hannie, the defendant was articulate, and able to discuss the consequences of retardation on his potential sentence, but politely refused to take any tests. He was neat, well groomed, and his speech was clear and intelligent, showing no impairment in thought processes. He also writes well and in an organized fashion, according to this expert. Most critically,

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[39] Instead, this expert attributed that the defendant's school problems to behavior problems.

[40] The defendant dropped out of school in junior high but then obtained his GED, although the documentary evidence of GED completion is disputed.

Dr. Hannie took a life history from defendant which appeared completely inconsistent with a diagnosis of mental retardation. By his own account, the defendant began his employment history at age 17 when he managed a cleaning crew at K-Mart. He then obtained a commercial operator's license and drove trucks throughout the United States, especially to the Eastern seaboard, using a map to find his way. The defendant also worked as a cook in a private school and ran his own catering business for parties and banquets. He had been employed by Job Link and Crossroads at their group homes for the mentally retarded. The defendant had also driven buses and worked his way up to First Mate on a tugboat. In the meanwhile, he had married twice. The defendant played the piano and taught himself all of the wind instruments. He directed a choir and recorded CDs with them. He had also opened a wholesale grocery business and operated a janitorial service. Following his arrest in the present case, the defendant became a "Podman" or someone with responsibility for an area in jail and the people in it. Dr. Hannie spoke with a Deputy Sullowd at the jail and learned that defendant had handled his responsibilities as a Podman "very well," that he communicated well and took the initiative, that he was helpful to others and that he read so much that he had to box some of the material up and send it home. Deputy Sullowd informed Dr. Hannie that he had dealt with mentally retarded prisoners and that defendant "was on the opposite side of the world . . . ."

The defendant resolutely maintained that he was not mentally retarded and after his interview with him and especially after receiving defendant's account of his own social and work history, Dr. Hannie found himself in complete agreement with him. In fact, Dr. Hannie disputed that the defendant's IQ test score of 70 placed him in the category of mild mental retardation as opposed to the "bottom of the borderline range of intelligen[ce]." Projecting the defendant's intelligence solely on the basis of the adaptive

skills he had displayed, Dr. Hannie concluded that his IQ score would be 96-100, well above the cutoff figure for mild mental retardation.

The commission's second member, Dr. Phillip Griffin, also a clinical psychologist, interviewed the defendant on June 4, 2004, after Dr. Hannie. The defendant initially resisted that interview but after Dr. Griffin sent him a message, he relented on the same day. Dr. Griffin's initial impression of defendant agreed with Hannie's. He appeared "neat and well groomed," a little "miffed at having to come talk to another psychologist," but calmed down quickly and appeared "willing to engage in conversation." Dr. Griffin agreed with Hannie that Dr. Zimmerman's measured IQ of 70 placed defendant in the borderline range of intelligence, slightly above mild mental retardation. Dr. Griffin also agreed that defendant particularly resisted any suggestion that he is mentally retarded stating, "[h]e seems to be a proud person," Dr. Griffin testified, and the defendant exhibited that pride by describing his work history in much the same manner as he did to Dr. Hannie. ("In those examples were some of his jobs: driving eighteen wheelers, counseling mentally retarded children, the fact that he's learned to play musical instruments, the fact that he reads law books to try to help his own case."). On the basis of the information provided by defendant, and his own view of the significance of the 70 IQ measured by Dr. Zimmerman, Dr. Griffin agreed with Dr. Hannie that defendant did not exhibit any of the diagnostic criteria of mental retardation.

After hearing the expert testimony, the court found that the defendant did not prove by a preponderance that he was mentally retarded. The court perceived the controlling law at that moment to be *Williams*. Although the court noted that it would have preferred that the defendant had cooperated with additional testing, the court found that clear and convincing evidence established that the defendant suffered no

impairment in adaptive functioning. The trial court then made an observation that has brought forth a firestorm of protest in the defendant's brief. Well aware that 2003 La. Acts 698 had passed both houses of the legislature and was awaiting the Governor's signature, and that it would take effect on August 15, 2003, the trial court warned counsel that it would maintain its ruling and not submit the issue of mental retardation to a jury because the defendant had failed to cooperate fully with Drs. Hannie and Griffin, as La. C.Cr.P. art. 905.5.1(G)[41] would shortly require, and had thereby lost his right to an instruction to jurors about the exemption of mentally retarded persons from capital punishment.

In a later written judgment, the trial court adhered to this ruling but clarified that the defense would have the opportunity to present, and a jury to consider, any evidence of defendant's alleged mental retardation as a mitigating circumstance. True to its word, the court then granted on July 17, 2003, less than a month before trial, the state's motion to preclude any jury instruction on the exemption of mentally retarded persons from execution. In fact, on August 16, 2003, one day after 2003 La. Acts 698 went into effect, the defense submitted a special requested charge on the exemption for mental retardation. The trial court did not rule on the motion on the record but in any event did not depart from its earlier rulings and did not instruct jurors on the exemption at the close of the penalty phase. During the penalty phase the parties stipulated to Dr. Zimmerman's measured IQ for defendant of 70. However, instead of presenting evidence of mental retardation as a mitigating factor, the defense

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[41] La. C.Cr.P. art. 905.5.1(G) provides that if the defendant making the claim of mental retardation fails to submit to or fully cooperate with any examination, upon motion of the district attorney, the district court "shall neither conduct a pretrial hearing concerning the issue of mental retardation nor instruct the jury of the prohibition of executing mentally retarded defendants."

presented witnesses to give jurors the opposite impression of the defendant as a capable and socially productive person with artistic leanings.

In brief, appellate counsel bitterly complains of the patent unfairness in the trial court's ruling which retroactively applied the rule of preclusion in La. C.Cr.P. art. 905.5.1 although the statute was not in effect at the time the defendant gave the interviews with Drs. Hannie and Griffin. Apart from that basic unfairness, and even apart from the question of whether defendant had in fact been uncooperative, counsel argues that La. C.Cr.P. art. 905.5.1 raises a host of constitutional questions under both the Fifth Amendment, by compelling the defendant to waive his privilege against self-incrimination under compulsion of the preclusion rule in subsection (G), and under the Eighth Amendment, by creating "the unacceptable risk that individuals with mental retardation will be executed . . ."

Under other circumstances, the trial court's determination over defense objection to rule on the reports of Drs. Hannie and Griffin only two months before 2003 La. Acts 698 became effective, yet its willingness to apply the act's provisions against the defendant to preclude any consideration at trial of the *Atkins* exemption, might raise serious questions. However, in the present case, no basic unfairness to the defendant resulted because the record is devoid of any evidence that he is in fact mentally retarded. The trial judge was not necessarily wrong in refusing to delay matters even two months and in ruling on the question of the defendant's mental status. The court was following the procedure set out by this Court in *Williams* as appropriate for resolving the question and, as discussed above, this Court was not alone in deeming the issue one for a judge to decide in a pre-trial context before the Louisiana legislature expressed its own superseding view. Given the testimony of Drs. Hannie and Griffin which fully supported the trial court's primary

ruling that the defendant is not mentally retarded, an instruction on the *Atkins* exemption was not pertinent to the case, and the record otherwise forecloses any possibility that the trial court's ruling on the merits induced the defense decision not to present mitigating evidence of defendant's alleged mental retardation for jurors at the sentencing stage. The trial court had expressly left open the opportunity for the defense to make that showing in mitigation, and it appears that counsel instead chose of their own volition a different path by presenting evidence of the defendant's productive role in society before the rape of his stepdaughter and, even, after his arrest, in jail as a "Podman," suggesting in a positive light that the defendant had worked hard and successfully to overcome any disadvantage caused by his marginal intelligence as measured by Dr. Zimmerman. These assignments of error lack merit.

Limited Mental Functioning

The defendant contends the trial court erred in denying his motion to allow guilt phase testimony of limited mental functioning. He contends that this evidence was essential to understand his statements to police and his reactions to the crime perpetrated on his stepdaughter, including the phone calls he made. The state presented witnesses to show that the defendant's reactions were unusual and therefore suspicious. The defendant contends those reactions could be innocently explained in light of his mental limitations.

La. C.Cr.P. art. 651 provides that "[w]hen a defendant is tried upon a plea of 'not guilty,' evidence of insanity or mental defect at the time of the offense shall not be admissible." Louisiana does not recognize a defense of "diminished mental capacity" short of legal insanity. *State v. Deboue*, 552 So. 2d 355, 366 (La. 1989), *cert. denied*, 498 U.S. 881, 111 S. Ct. 215 (1990); *State v. Nelson*, 459 So. 2d 510 (La. 1984); *State v. LeCompte*, 371 So. 2d 239 (La.

1978). Legal insanity, in Louisiana, is the inability to distinguish right from wrong with reference to the conduct in question. La. R.S. 14:14.

The defendant's contention that he should have been permitted to explain his behavior by presenting evidence of mental retardation, in addition to amounting to a "diminished mental capacity" defense short of legal insanity, is contrary to the evidence presented by the defense as presented above, which showed that the defendant in fact showed no impairment in daily living skills.

Victim's Emotional Display

The defendant contends the victim's display of emotions on the stand tainted the proceedings and should have resulted in mistrial, particularly in this case in which the district court refused a defense request to instruct the jury to disregard the emotional display and makes its findings solely on the evidence. The defendant notes that the state was able to capitalize on one outburst, which resulted when the prosecuting attorney left the courtroom and the victim waited on the stand for the prosecutor to return, in closing argument.

Assuming arguendo the facts as presented by the defendant, however, La. C.Cr.P. art. 775 states that "a mistrial shall be ordered . . . when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial . . . ." *See also* La. C.Cr.P. art. 905.1 (adopting trial procedures into penalty phase). A mistrial, however, is a drastic remedy and a trial judge has broad discretion in determining whether conduct is so prejudicial so as to deprive an accused of a fair trial. *State v. Wingo*, 457 So. 2d 1159, 1166 (La. 1984). However, as a general proposition unsolicited statements and spontaneous conduct of a witness are usually not grounds for a mistrial. *See State v. Newman*, 283 So. 2d 756, 758 (La. 1973).

The record also reflects that there were no verbal outbursts by the victim; rather she was crying and looked upset, the degree to which is disputed. Furthermore, the district court noted that the victim's state was understandable, minimal, and that the jury appeared unaffected by it. In similar cases, more extreme emotional displays have not warranted a mistrial. *See e.g., State v. Hopkins*, 626 So. 2d 820, 822-23 (La. App. 2 Cir. 1993) (although the victim's family was upset and cried during closing arguments, the trial judge denied a mistrial and although not immediately, did charge the jury not to be influenced by sympathy, passions, prejudice or public opinion); *State v. Worthen,* 550 So. 2d 399, 401-02 (La. App. 3 Cir. 1989) (appellate court affirmed the denial of a mistrial based on an unprovoked verbal outburst and crying by the victim while being cross-examined; the trial judge noted the victim's emotional state was understandable and strongly admonished the jury).

Prosecutorial Misconduct

The defendant contends the prosecution made several inappropriate comments during closing: (1) asking the jury to convict the defendant to protect the victim and (2) calling the defendant a monster. The defendant also contends the state improperly elicited testimony from the pediatric expert regarding the severity of the victim's injuries (which was not disputed) as a way of bolstering the victim's truthfulness despite the refusal of the trial court to qualify this witness as an expert in delayed reporting by victims of child sexual abuse.

To assist in evaluating these claims, closing arguments in their entirety have been reviewed. First, the state argued that the defendant engaged in suspicious behavior, which included phone calls and attempting to clean the carpets, before reporting the rape. The state noted that no other person saw

the person fleeing on a bicycle, as reported by the defendant, despite the proximity of the responding officer and the quick police response. The state argued further that there was no evidence of a rape occurring outside. The state noted that the defendant's description of the perpetrator did not match Devon Oatis. Finally, the state argued that the victim's second videotaped interview resulted from her need finally to tell the truth.

The defense responded that the computer screen at the carpet cleaning service did not match the witness's memory of the call, and asked the jury to consider the fallibility of human memory when considering the phone call evidence. The defense explained the defendant's unusual behavior as resulting from an understandable and natural reluctance to tell persons outside the family that his stepdaughter had just been raped. The defense argued that the victim's first videotaped interview was more detailed and consistent with the evidence, despite the obvious pressure placed upon her by the adults present. The defense noted that the second videotaped interview lacked detail. For example, the cargo blanket, which figured prominently in the crime, was never mentioned in that interview. Therefore, the defense asked the jurors to compare the two statements and determine which was true. The defense added that the mattress pad, relied upon by the state initially in suspecting the defendant, was shown by DNA testing to be irrelevant to the crime. The defense argued that, although the police described Devon Oatis's bicycle as inoperable, a witness testified that she saw him riding it. The defense suggested that it could not be coincidental that Devon Oatis arranged to have his mother pick him up from school the same day as the rape. The defense responded to the state's assertion that the defendant delayed in reporting the rape by arguing that, given the extent of the blood loss, it was not possible that the defendant delayed very long, if at all. The defense finally characterized the case as one based solely on emotion but argued that, when the evidence was examined

without emotion, there was simply insufficient proof to establish beyond a reasonable doubt that the defendant raped the victim.

The state argued in rebuttal that the defendant's phone calls the morning of the rape are too unusual to be explained innocently and noted that the discrepancy between the cleaning service's computer and employee's testimony was adequately explained by the witness. The state emphasized that the defendant was always present to interrupt the victim when she was questioned. The state argued that the defendant's identification of Oatis's bicycle was inconsistent. The state claimed that the victim's first videotaped statement of how the crime occurred simply did not make sense. The state responded to the defense's claims that the victim was pressured to accuse the defendant by noting that, although C.H.'s custody of her daughter was restored on June 22, 1998, the victim did not accuse the defendant until December 1999. The state closed with the comments found objectionable by the defense:

> You saw L.H. in the courtroom; how hard it was for her to come in here. You can only imagine. She's telling you what happened to her. She can't go to her Dad, because he is the monster. Only you can protect her.

Closing arguments in criminal cases should be restricted to the evidence admitted, to the lack of evidence, to conclusions of fact that may be drawn therefrom and to the law applicable to the case. La. C.Cr.P. art. 774. Louisiana jurisprudence on prosecutorial misconduct allows prosecutors considerable latitude in choosing closing argument tactics. The trial judge has broad discretion in controlling the scope of closing argument. *State v. Prestridge*, 399 So. 2d 564, 580 (La. 1982). Even if the prosecutor exceeds these bounds, the Court will not reverse a conviction unless "thoroughly

convinced" that the argument influenced the jury and contributed to the verdict. *See State v. Martin*, 93-0285 (La. 10/17/95), 645 So. 2d 190, 200; *State v. Jarman*, 445 So. 2d 1184, 1188 (La. 1984); *State v. Dupre*, 408 So. 2d 1229, 1234 (La. 1982).

In the instant case, the bulk of the state's arguments were fair statements of the evidence admitted and the lack of evidence to corroborate the defense's theory of the case. The final statement by the state during closing (quoted above), however, bordered on improper. But as noted above, improper closing argument does not constitute reversible error unless the appellate court is thoroughly convinced that the remarks influenced the jury and contributed to the verdict. The reviewing court must also give credit "to the good sense and fair-mindedness of jurors who have heard the evidence." *State v. Jarman*, *supra* at 1188. Reading the prosecutor's argument as a whole, and considering the entirety of the record, nothing the defense argues indicates that these remarks so influenced the jury that they contributed to the verdict. Given the traditional breadth accorded the scope of closing arguments by this Court, none of these comments would either individually (or collectively for that matter) merit reversing the defendant's conviction and sentence. *See, e.g.*, *State v. Martin*, 539 So. 2d 1235, 1240 (La. 1989) (closing argument referring to "smoke screen" tactics and defense "commie pinkos" held inarticulate but not reversible); *State v. Copeland*, 530 So. 2d 526, 545 (La. 1988) (prosecutor's waving a gruesome photo at jury and urging jury to look at it if they become "weak kneed" during deliberations held not improper). This Court has declined to reverse elsewhere when similarly ill-considered epithets were employed. *See State v. Bridgewater*, 00-1529, p. 33 (La. 1/15/02), 823 So. 2d 877, 903 ("animal" and "cold-blooded killer on the hunt for prey"); *State v. Martin*, *supra*, 645 So. 2d at 200-201 (defendant as "beast" to the victim's "beauty"); *State v. Gray*, 351 So. 2d 448, 460 (La. 1977) ("animal").

Given that the defendant fails to show any reasonable likelihood that the argument influenced the verdict, this assignment does not warrant relief.

Regarding the defense's complaint that the testimony of the pediatric expert regarding the victim's injuries was an impermissible means of bolstering the credibility of the victim, the trial judge is vested with broad discretion in ruling on the scope of expert testimony. La. C.E. art. 702; *State v. Billiot*, 94-2419 (La. App. 1 Cir. 4/4/96), 672 So. 2d 361, 373; *State v. Mays*, 612 So. 2d 1040, 1044 (La. App. 3 Cir. 1993), *writ denied*, 619 So. 2d 576 (La. 1993). The court did not permit this witness to usurp the jury's ultimate fact-finding role on the question of guilt or innocence.

The state is entitled to the moral force of its evidence, and just as post-mortem photographs of murder victims are admissible to prove corpus delicti, to corroborate other evidence establishing cause of death, as well as location and placement of wounds and to provide positive identification of the victim, as discussed below, this expert's testimony was permissible to establish that a rape had occurred and that it was an exceptionally brutal one. The witness never opined whether the victim would be more likely to accuse her attacker truthfully because of the severity of the injuries. This witness simply testified that it was clear that the victim had been raped and that her injuries were the most severe he had seen during his practice to have resulted from sexual assault.

Gruesome Photographs

The defendant contends gruesome photographs of the victim were admitted at trial despite the lack of probative value in a case in which the fact of the rape and the extent of the injuries were not disputed. The defendant objects that, although the state was ordered pre-trial to limit the images to the dimension of five-by-seven inches, at trial the state

produced larger images.

Under La. C.E. art. 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." The cumulative nature of photographic evidence does not render it inadmissible if it corroborates the testimony of witnesses on essential matters. *State v. Lane*, 414 So. 2d 1223, 1227 (La. 1982); *State v. Miles*, 402 So. 2d 644, 647 (La. 1981). "The trial court has considerable discretion in the admission of photographs [and] its ruling will not be disturbed in the absence of an abuse of that discretion." *State v. Gallow*, 338 So. 2d 920, 923 (La. 1976); *see Watson*, 449 So. 2d at 1326 (admission of gruesome photographs will not be overturned absent a showing that their prejudicial effect outweighs their probative value).

Photographs are generally admissible if they illustrate any fact, shed any light upon an issue in the case, or are relevant to describe the person, thing, or place depicted. *State v. Jackson*, 30,473 (La. App. 2 Cir. 5/13/98), 714 So. 2d 87, 96, *writ denied*, 98-1778 (La. 12/6/98), 727 So. 2d 444. It is well-settled that a trial court's ruling with respect to the admissibility of allegedly gruesome photographs will not be overturned unless it is clear that the prejudicial effect of the evidence outweighs its probative value. *State v. Maxie*, 93-2158 (La. 4/10/95), 653 So. 2d 526, 532 n.8 (La. 1995).

Even when the cause of death is not at issue, the state is entitled to the moral force of its evidence and postmortem photographs of murder victims are generally admissible to prove corpus delicti, to corroborate other evidence establishing cause of death, location, placement of wounds, as well as to provide positive identification of the victim. *State v. Letulier*, 97-1360 (La. 7/8/98), 750 So. 2d 784, 794-95; *State v. Robertson*, 97-0177 (La. 3/4/98), 712 So. 2d 8, 32; *State v. Koon*, 96-1208 (La. 5/20/97), 704 So. 2d 756, 776;

State v. Maxie, *supra* at 532. Photographic evidence will be admitted unless it is so gruesome as to overwhelm the jurors' reason and lead them to convict the defendant without sufficient evidence, *i.e.*, when the prejudicial effect of the photographs substantially outweighs their probative value. *State v. Broaden*, 99-2124 (La. 2/21/01), 780 So. 2d 349, 364 (citing *State v. Martin*, 93-0285 (La. 10/17/94), 645 So. 2d 190, 198)); *State v. Perry*, 502 So. 2d 543, 558-59 (La. 1986).

The photographs at issue, although depicting serious injuries, are not so gruesome as to be overwhelming. Although they depict more severe injuries than are typically seen in a rape case, they are comparable to the photographs that are routinely deemed admissible in other capital cases, and they are directly relevant to prove the extreme brutality of this rape. The defendant shows no abuse of discretion on the part of the trial judge in admitting these photographs.

Dr. Lee's Testimony

The defendant contends Dr. Lee's testimony that the photos of the yard are inconsistent with a struggle occurring there because the grass and soil are undisturbed was "junk" science not admissible under *Daubert*. A challenge to the reliability of the methods used by an expert must be examined through a *Daubert* hearing, which was not requested by the defendant at trial.[42]

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[42] As a general matter, under the standards set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct 2786, 125 L. Ed. 2d 469 (1993), which this Court explicitly adopted in *State v. Foret*, 628 So. 2d 1116, 1121 (La. 1993) (Louisiana's La. C.E. art. 702 "virtually identical to its source provision in the Federal Rules of Evidence. . . [Rule] 702"), the trial court is required to perform a "gatekeeping" function to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589, 113 S. Ct. at 2795. In performing this function, a trial court must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. *Kumho Tire Company, Ltd., v.*

The parties stipulated as to this witness's qualifications, *inter alia*, as an expert in criminalistics and crime scene reconstruction, and he was permitted to testify without objection that he examined the victim's clothes for soil or grass trace and found none. Other witnesses also testified they saw no sign of a struggle occurring in this location without objection. The defendant's characterization of this testimony as one based on knowledge of grass breakage rates, is not accurate. The expert simply opined, as did several other witnesses, that the crime scene in the yard did not appear consistent with a rape occurring there, and added that he had examined the victim's clothing and found no evidence of grass stain, soil, or abrasion consistent with being dragged through the yard.

When the state first asked Dr. Lee whether the physical evidence was consistent with the victim's story, the defense objected on the basis that the state was seeking scientific testimony as to whether the victim was telling the truth. The state rephrased, and the expert testified without objection. Because counsel did not object to the claimed error after the question was rephrased, he waived any claim based on it. La. C.Cr.P. art. 841. This assignment of error lacks merit.

Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 1176, 143 L. Ed. 2d 238 (1999). While *Daubert* specifically addressed scientific evidence, *Kumho* made clear that the trial court's essential gatekeeping function applies to all expert testimony, including opinion evidence based solely on special training or experience. *Id.*, 526 U.S. at 148-49, 119 S. Ct. at 1174-75. In the end, "the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" *Id.*, 526 U.S. at 149, 119 S. Ct. at 1174 (quoting *Daubert*, 509 U.S. at 592, 113 S. Ct. at 2796.) "Whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability . . . is a matter that . . . the trial judge [has] broad latitude to determine," and a decision to admit or exclude is reviewed on an abuse-of-discretion standard. *Id.*, 526 U.S. at 153, 119 S. Ct. at 1176.

Sufficiency of the Evidence

The defendant contends the evidence was insufficient to support the conviction because for every piece of inculpatory evidence there is exculpatory evidence, *e.g.*, in contradictory victim statements in which the defendant is alternatively denied to have been the rapist and then accused.

Aggravated rape in the instant case is vaginal intercourse, deemed to be without lawful consent, because the victim is under the age of 12 years. R.S. 14:42(A)(4); (D)(2). Any penetration, however slight, is sufficient to complete the crime. R.S. 14:41. "In reviewing the sufficiency of the evidence to support a conviction, an appellate court in Louisiana is controlled by the standard enunciated by the United States Supreme Court in *Jackson v. Virginia*, 433 U.S. 307, 99 S. Ct. 2781 (1979). . . . [T]he appellate court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt." *State v. Captville*, 448 So. 2d 676, 678 (La. 1984). This Court has stated that when a reviewing court evaluates the sufficiency of the evidence under the *Jackson* standard, all of the evidence submitted to the trier of fact should be considered, including that which was admitted in error. *State v. Martin*, 595 So. 2d 592, 597 (La. 1992). The evidence admitted in the instant case was clearly sufficient to establish that the defendant committed an aggravated rape in the form of vaginal penetration upon the victim who was less than 12 years old at the time. The jury was presented with evidence that the defendant waited to call 911 while he attempted to clean up the crime scene and that there was no evidence supporting his version of what happened to his stepdaughter. The jury also were presented with the conflicting victim statements, and obviously chose to believe the victim's testimony that the

defendant raped her. This assignment of error lacks merit.

Admission of Evidence

The defendant contends that his allegedly contradictory statements to investigating officers should not have been admitted because several of them were taken without a preceding *Miranda* warning. The defendant also contends that evidence collected after the victim was transported by ambulance from the crime scene should have been suppressed.

Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602 (1966), bars government use of any statement, of whatever stripe, stemming from interrogation of a defendant who has been "taken into custody or otherwise deprived of his freedom of action in any significant way," unless warned that he has the right to remain silent, that any statement he does make can be used against him and that he has the right to counsel, retained or appointed. The warnings are a prerequisite to the admission of any statement in the state's case-in-chief, whether confession, alibi, exculpatory assertion or admission, as "[t]he privilege . . . protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination . . . [and] . . . no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" *Id.*, 86 S. Ct. at 1629.

However, the obligation to administer *Miranda* warnings attaches only when a person is questioned by law enforcement after he has been taken "into custody or otherwise deprived of his freedom of action in any significant way." *Id.* Custody is decided by two distinct inquiries: an objective assessment of the circumstances surrounding the interrogation to determine whether there is a formal arrest or restraint on freedom of the degree associated with formal

arrest; and, second, an evaluation of how a reasonable person in the position of the interviewee would gauge the breadth of his freedom of action. *Stansbury v. California*, 511 U.S. 322-25, 114 S. Ct. 1526, 1528-30 (1994) (citing *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520 (1983) (per curiam), *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714 (1977) (per curiam)). *See Thompson v. Keohane, Warden*, 516 U.S. 99, 112-15, 116 S. Ct. 457, 465-466 (1995). No one factor, such as time, place, kind of question, focus of investigation, probable cause for arrest prior to questioning, intent of the officer or belief of the suspect, is dispositive of the question of custody; each case turns on its own facts and is decided under the totality of circumstances. *See, e.g., Stansbury v. California, supra.*

As such, *Miranda* warnings are not required when officers conduct preliminary, non-custodial, on-the-scene questioning to determine whether a crime has been committed, unless the accused is subjected to arrest or a significant restraint short of arrest. *State v. Davis*, 448 So. 2d 645, 651-652 (La. 1984); *State v. Mitchell*, 437 So. 2d 264, 266 (La. 1983); *State v. Thompson*, 399 So. 2d 1161, 1165-67 (La. 1981) (dissent at 400 So. 2d 1080); *State v. Menne*, 380 So. 2d 14, 17 (La.1980); *State v. Hodges*, 349 So. 2d 250, 255-57 (La. 1977); *State v. Brown*, 340 So. 2d 1306, 1308 (La. 1977); *State v. Watkins*, 526 So. 2d 357, 359-360 (La. App. 4 Cir 1988). Thus, an individual's responses to on-the-scene and non-custodial questioning, particularly that carried out in public, are admissible without *Miranda* cautions. *See State v. Davis, supra* (Question, "Who shot the deer?" directed to a group of hunters did not point the finger of suspicion at any one person, even though wildlife agent knew that does had been taken and that citizens were holding the culprits, and therefore did not require *Miranda* warnings); *State v. Thompson, supra* (question of "how he came by the blood spots on his shirt," asked by officer of man in motel lobby identified as perpetrator of assault and who agreed to

talk with the officer, was to learn if crime had occurred and therefore occurred in a pre-custodial setting which did not require *Miranda* warnings); *State v. Mitchell, supra* (question asked by an Arkansas deputy after handcuffing a drunken Monroe driver for traffic offenses and noticing dried blood on his neck, "What happened?" did not amount to custodial interrogation for *Miranda* purposes; defendant's reply, "My wife shot me," admissible without *Miranda* under time pressure of finding injured wife).

That general, preliminary questioning is conducted in a private home does not alter the analysis or necessarily transform the situation into custodial interrogation. *Beckwith v. United States*, 424 U.S. 341, 96 S. Ct. 1612 (1976) (rejecting claim that questioning in home by two IRS agents after the investigation had focused on the defendant requires *Miranda* cautions; partial *Miranda* warnings given, however). *See State v. Hodges, supra* (officer merely conducted non-custodial preliminary questioning when he responded to a report of shooting, saw a crowd gathered, asked "Who got shot?" and elicited the defendant's response, "My wife;" no custody found); *State v. Anderson*, 332 So. 2d 452, 456-457 (La. 1976) (Single question, "What happened?" after deputy went to the defendant's home and issued incomplete *Miranda* warnings, did not require *Miranda* warnings; defendant's replies were admissible on grounds that he was not in custody); *State v. Roach*, 322 So. 2d 222, 226-227 (La. 1975) (police, executing a search warrant found marijuana seeds and gleanings, asked occupant which was his bedroom; response held admissible on grounds that no custody or significant detention existed).

The following statements are at issue. Deputy Burgess responded to the reported rape and spoke with the defendant to ascertain what was going on. He obtained a description of the perpetrators, which he conveyed to other officers by radio. This clearly constituted a preliminary, non-custodial, on-the-

scene questioning to determine whether a crime has been committed, requiring no *Miranda* warnings. Detective O'Cull later obtained information from the defendant as the caller or complainant in the form of a witness statement. This was a recorded statement taken at the dining room table in the home. The defendant was not a suspect at this time. The fact that this statement was given in the home tends to negate a custodial setting and no *Miranda* warnings were necessary. Detective Bradstreet indicated that the defendant voluntarily accompanied him to the store to assist the officers in identifying the type of bicycle used by the attacker. All the remaining statements followed *Miranda* warnings: Detective Hullihan indicated that he was going over information with the defendant at the Detective Bureau and it was his standard procedure to go through the rights form and *Mirandize* as a precaution; Sergeant Monie said he *Mirandized* the defendant and obtained a voluntarily signed rights waiver form before taking a statement.

The trial judge heard the officers' testimony at the November 12, 1999, hearing on the motion to suppress. There appears no error in the trial judge's determination. The initial statements were clearly preliminary, non-custodial, on-the-scene statements to police. Thereafter, the defendant was *Mirandized* before being questioned and the trial judge determined that his statements were voluntarily made. *See State v. Vessell*, 450 So. 2d 938, 943 (La. 1984) (credibility determinations at motion to suppress hearings lie within the sound discretion of the trial court). Regarding the defendant's contention that evidence was impermissibly seized from the home, the police processed the crime scene after responding to the reported rape. Sergeant Jones testified that they were invited into the home and not asked to leave when the victim was transported to the hospital. When the defendant became a suspect, four separate search warrants were obtained and executed for his body and the home. The trial judge also evaluated this claim at the motion to suppress hearing, and the

defendant has shown no abuse of discretion in the denial of his motion to suppress.

Jury instructions

The defendant contends the jury received several inappropriate jury instructions and that the jury should have been instructed on mitigating circumstances as requested by the defense.

The defense objected to the following instruction, contending that it prohibits jurors from using outside evidence to acquit but does not contain a comparable prohibition against using outside evidence to convict:

> You are prohibited by law and your oath from going beyond the evidence to seek for doubts upon which to acquit the defendant, but you must confine yourselves strictly to a dispassionate consideration of the testimony given upon trial. You must not resort to extraneous facts or circumstances in reaching your verdict. That is, you must not go beyond the evidence to find facts or circumstances creating doubts, but you must restrict yourselves to the evidence that you heard on the trial of this case, or the lack of evidence.

However, the jury instructions *in toto* clearly instruct the jury that the defendant is presumed innocent and his guilt can only be proved beyond a reasonable doubt by the evidence, which is defined clearly for the jury as testimony and exhibits and stipulations and to exclude attorney argument and things the judge instructed the jury to ignore. The jury is clearly instructed that "[y]ou are expected to reach a verdict based on the evidence or lack of evidence." This final cautionary note which permitted jurors to find reasonable doubt from the lack of evidence reclaimed the instruction as a whole. *Cf. State v. Mack*, 403 So. 2d 6, 10 (La. 1981) (charge confining jury to

the evidence presented at trial as a basis for finding reasonable doubt does not comply with La. C.Cr.P. art. 804(A)(2) which requires a trial judge to instruct jurors to give defendant the benefit of "every reasonable doubt arising out of the evidence or out of the lack of evidence in the case."); *see also State v. Rault*, 445 So. 2d 1203, 1212 (La. 1984) (trial court may either read Art. 804 to jurors or give a "substantially equivalent" charge.).

The defense also objects to the instructions as a whole contending they give the impression of an elevated reasonable doubt standard throughout, and in particular in stating:

> Reasonable doubt is based upon reason and common sense and is present when, after you have carefully considered all of the evidence, you cannot say that you are firmly convinced of the truth of the charge.

The defendant contends this creates an impermissible articulation requirement. However, the reasonable doubt instruction in its entirety is as follows: A person accused of a crime is presumed by law to be innocent until each element of the crime, necessary to constitute his guilty, is proved beyond a reasonable doubt. Reasonable doubt is based upon reason and common sense and is present when, after you have carefully considered all of the evidence, you cannot say that you are firmly convinced of the truth of the charge. It is the duty of the jury if not convinced of the guilt of a defendant beyond a reasonable doubt, to find him not guilty. The defendant argues a reasonable juror could have interpreted the reasonable doubt instruction to allow a finding of guilt based on a degree of proof below that required by the due process clause of the Fifth and Fourteenth Amendments. In a criminal charge, the state must establish the guilt of a defendant by proof beyond a reasonable doubt. *State v. Smith*, 91-0749 (La. 5/23/94), 637 So. 2d 398, 400 (citing *In re Winship*, 397 U.S. 358, 361 90 S. Ct. 1068, 1071, 25 L. Ed. 2d 368 (1970)). The

purpose of reviewing a reasonable doubt instruction is to ensure that the trial judge did not overstate the degree of doubt required. *State v. Gamble*, 93-0809 (La. App. 3 Cir. 2/2/94), 631 So. 2d 586. A reviewing court is required to consider how reasonable jurors could have understood the charge as a whole. *Id.* at 590 (citing *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990)).

The instruction in the present case is not constitutionally deficient. It is not reasonably likely that the instructions provided by the trial court led the jurors to convict based on proof insufficient to meet the *Winship* standard. The trial court did not use words and phrases such as, "moral certainty" or "substantial doubt," like those found in the improper instruction given in *Cage*. The instruction delivered by the trial court is clear and concise in defining the burden of proof. The trial court repeatedly stated the burden of proof upon the state was beyond a reasonable doubt. Furthermore, after the judge instructed the jury on the state's burden, he defined "reasonable doubt." The definition provided was it is "doubt based on reason and common sense." The jury instructions clearly outlined the proper burden of proof and did not include any confusing or misleading language as to affect the degree of doubt required. The defendant's claim, therefore, is without merit.

Cumulative Effect of Errors

The defendant contends the cumulative effect of errors renders the proceedings defective and asks this Court to examine the record of any additional errors that were not briefed.

The record has been reviewed *in toto* and the proceedings do not appear defective or globally unfair. Although not briefed by the defendant, in his appellate brief defendant makes a cursory allegation that he received ineffective

assistance of counsel, as in context of the admission of the second videotaped victim interview:

> Moreover, given the devastating impact of the videotape, to the extent the failure to object constitutes a waiver, it is clear that such a failure would constitute ineffective assistance of counsel.

A claim for ineffective assistance of counsel is properly raised in an application for post-conviction relief. *State v. Burkhalter*, 428 So. 2d 449, 456 (La. 1983). Although it is not clear whether by making such a skeletal claim in his appeal brief whether defendant wished to pursue this claim at this time, at oral argument before this Court, defense counsel clearly stated that he was not making a claim for ineffective assistance of counsel at this time. In addition, the defendant has not demonstrated that any claimed errors rendered his trial globally unfair or the verdict generally suspect. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

Penalty Phase Errors Prosecutorial Misconduct

The defendant contends the state engaged in misconduct by arguing in essence that the victim would like the defendant to be killed. To assist in evaluating the extent of the prosecutorial misconduct, if any, the state's argument from the penalty phase (which is brief) is reproduced below *in toto:*

> I'm going to tell y'all something and then I'm going to sit down.
>
> You want to know what L.H. wants, or what she thinks. You want to know what S.L. was trying to tell you. Why does Patrick Kennedy deserve to die. You want me to tell you why. I'm going to tell you why. Because as Mr. Paciera told you yesterday; an adult, a

Stepfather and a Godfather who has custody of the child had the ultimate trust in the world. They give us love and they give us comfort, and they teach us who we are. She deserves, L.H. does, to have a time and place to where he's sentenced to die. She deserves that. She deserves that because of what she's been through. Because by doing that ladies and gentlemen, by doing the duty that you said you could do, each and every one of you went through ad nauseum the Voir Dire on capital sentence. And you said that if given the facts, you could impose the death penalty. We've given you those facts.

L.H. is asking you, asking you to set up a time and place when he dies.

At this point, defense counsel objected that this argument amounted to testimony, was highly prejudicial, was outside of the evidence, and was not appropriate. The state continued:

Ladies and gentlemen, as a child—Mr. Paciera is right—it's the same thing. Those of you that have children know that people have nightmares. They want the lights on, don't they. They want you to check under the bed; make sure there is no monster. Make sure there's nothing under the bed, Daddy. Make sure all of these things.

Do your jobs and do what you told me you could do, each and every one of you. Each and every one of you do your jobs. Tell L.H. we're turning out the light. You can go to sleep baby, because we're going to make sure—we're going to make sure that you sleep. We're going to make sure; turn out the light and rest easy.

Do your jobs ladies and gentlemen. The State is

> asking you to impose the death penalty on Mr. Kennedy, because this is how Mr. Kennedy touched L.H. That's how he touched L.H., and that's how he left her. That's his footprint in the sand. That's his footprint. This is wrong. He is wrong. Give him the death penalty for what he has done.

The scope of proper argument is limited to the evidence admitted, to the lack of evidence, to conclusions of law either side may draw, and to the law applicable to the case. La. C.Cr.P. art. 774. Generally, a prosecutor may not resort to personal experience or inject personal opinions about the defendant into argument. On the other hand, prosecutors have considerable leeway in making closing arguments and may press upon the jury any view of the case supported by the evidence. *State v. Frost*, 97-1771 (La. 12/1/98), 727 So. 2d 417, 432-433. Improper argument will not bring reversal unless this Court is "thoroughly convinced that the jury was influenced by the remarks and that such contributed to the verdict." *State v. Hart*, 96-0697 (La. 3/7/97), 691 So. 2d 651, 660 (quoting *State v. Jarman*, *supra* at 1188).

During its closing, the defense argued first as follows:

> How will executing him help L.H.? These are questions I want you to consider. How will it affect her? How would it affect her if she were to learn, which she will, because she will be notified every time there is a decision, every time there is any proceeding in the future regarding a death sentence. How will she handle having to deal with that for many years to come . . . How will L.H. ever be able to get past this until it is final. What would it do to her? Why is it necessary for Patrick Kennedy to be executed?

Thus, the state's arguments would appear a fair attempt

to respond to the issues raised by the defense regarding the psychological impact on the victim and her need for finality. Some additional leeway is allowed the prosecutor in making remarks that would ordinarily be inappropriate but are provoked by defense argument. *State v. Thomas*, 572 So. 2d 681 (La. App. 1 Cir. 1990); *State v. Lockett*, 332 So. 2d 443 (La. 1976); *State v. Sosa*, 328 So. 2d 889 (La. 1976).

In any event, as discussed above in the context of the state's arguments during the culpability phase, Louisiana jurisprudence on prosecutorial misconduct allows prosecutors wide latitude in choosing closing argument tactics. Even urging a death verdict on the basis of an "eye-for-an-eye" argument, although criticized, *State v. Monroe*, 397 So. 2d 1258, 1271 (La. 1981), has been held to be not reversible unless the argument, when reviewed as a whole, urges jurors to "disregard the law as given" by the trial court in its instructions. *Id.* Thus, the state's arguments appear more fairly characterized as claims that the victim has been deeply affected by the crime, that the defendant abused his paternal role and position of trust, and that the victim requires finality. The first two are simply fair characterizations of the evidence and reasonable conclusions of fact. The second, a fair response to the defendant's own closing argument. The prosecutor's rebuttal is entitled to the same breadth and scope as the defendant's closing. *State v. Williams*, 353 So. 2d 1307 (La. 1977).

Unadjudicated Prior Conduct

The defendant objects to the presentation of evidence regarding an unadjudicated prior rape of another victim alleged to have been committed by him several years ago upon a different victim, which defendant contends was not proved by clear and convincing evidence. The defendant contends that permissible victim impact testimony does not extend to other victims. The defendant objects that these

allegations, in addition to be unadjudicated, were impossible to defend against considering that all relevant documentation had been destroyed. Moreover, the defendant contends the conduct at issue could no longer be prosecuted given the expiration of the limitations period.

In this case, the state gave pre-trial notice of its intent to introduce evidence of this prior unadjudicated criminal conduct during the culpability phase, which was ultimately prohibited by this Court. Although barred from the culpability phase, the state's witness, S.L., testified to the following during the penalty phase. The defendant was married to her cousin and godmother, C.S. S.L. spent the summer with them when she was about eight or nine years old. The defendant sexually abused her three times. The first was inappropriate touching. The last was intercourse. She did not tell anyone about it until two years later. The family pressured her not to pursue legal action. The testimony was brief and is transcribed in four pages.

La. C.Cr.P. art. 905.2 provides that "[t]he sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the impact that the death of the victim has had on family members." Rules governing the admission in penalty phase hearings of unrelated and unadjudicated crimes evidence to prove the defendant's character and propensities have evolved jurisprudentially. In *State v. Brooks*, 541 So. 2d 801 (La. 1989) this Court approved the state's introduction in its case-in-chief in the penalty phase of two unrelated and unadjudicated murders once the trial judge determined that: (1) the evidence of the defendant's commission of the unrelated criminal conduct is clear and convincing; (2) the proffered evidence is otherwise competent and reliable; and (3) the unrelated conduct has relevance and substantial probative value as to the defendant's character and propensities. *Brooks*, 541 So. 2d at 814. In *State v. Jackson*,

supra, the Court granted pre-trial writs to establish limitations on admissibility of unrelated and unadjudicated criminal conduct in capital sentencing hearings. *Jackson* also incorporated the three-pronged test from *Brooks*. *Jackson*, 608 So. 2d at 956. There, the Court ruled that the evidence of the unadjudicated criminal conduct must involve violence against the person of the victim for which the period of limitation for instituting prosecution had not run at the time of the indictment of the accused for capital murder. *Jackson*, 608 So. 2d at 955. Applying the limitations of *Jackson*, this court in *State v. Bourque*, 622 So. 2d 198 (La. 1993) held that evidence of an unrelated and unadjudicated killing, committed one hour before the murder at issue in the capital case being tried, was admissible, since it was relevant evidence of Bourque's character and propensities and fell within *Jackson*'s limitations. However, a majority of the court reversed the death sentence on the basis that the prosecutor "presented a prohibited 'mini-trial' on the issue of the defendant's guilt or innocence of the killing of Jasper Fontenot," the unrelated and unadjudicated conduct. *Id.* at 248.

Thus, the *Bourque* decision limited the amount of admissible evidence that the prosecutor may introduce in the case-in-chief of the penalty phase, holding that anything beyond "minimal evidence" of the unadjudicated criminal conduct impermissibly shifts the focus of the capital sentencing jury from the character and propensities of the defendant to the determination of the guilt or innocence of the defendant with respect to the unadjudicated criminal conduct. However, in *State v. Comeaux*, 93-2729 (La. 7/1/97), 699 So. 2d 16, this Court revisited the issue and held that *Bourque*'s further limitation on the amount of admissible evidence, no matter how highly relevant to the defendant's character and propensities, was unnecessary to guarantee due process. The Court noted that the thrust of the *Jackson* decision was not to exclude any evidence that was significantly relevant to the

defendant's character and propensities, no matter what the amount of the evidence was, but rather to maintain the jury's focus on their function of deciding the appropriate penalty by eliminating marginally relevant evidence that does not aid the jury in performing this function.

As a result, *Comeaux* provided guidelines to help determine whether character and propensity evidence is admissible at the penalty phase. The court held that evidence which establishes that the defendant, in the recent past, "has engaged in criminal conduct involving violence to the person is highly probative of the defendant's character and propensities." *Id.* "On the other hand, the type of evidence that tends to inject arbitrary factors into a capital sentencing hearing usually is evidence which is of only marginal relevance to the jury's determination of the character and propensities of the defendant." *Id.*

The State did not inject an arbitrary factor into the penalty phase when it introduced evidence of the unadjudicated rape of S.L. by the defendant when she was a child, when considering the standard set forth in *Comeaux*. The state only introduced one witness, the victim, who testified briefly, and thus, did not present a "prohibited mini-trial." *See State v. Robertson*, *supra* at 40 (permitting both victims to testify at penalty phase to defendant's previous criminal conduct did not violate *Jackson* limitation allowing either "testimony of the victim or of any eyewitness to the crime"). The evidence presented was highly relevant to defendant's character and propensity to rape children under his supervision.

Nor does it appear that the state was prevented from prosecuting the conduct at issue by a statutory limitations period, as the defendant contends. The parties disagree to some extent on the precise dates of the prior unadjudicated criminal conduct, but both place the events in the vicinity of

1984. At that time, these offenses would constitute aggravated rape of a juvenile and have been punishable by life in prison. The parties agree that the defendant could have been prosecuted for the aggravated rape of S.L. when La. C.Cr.P. art. 571 was amended by 1984 La. Acts, No. 926 § 1 to remove the limitations period for such an offense.

This Court has previously ruled that when a prescriptive period has not yet expired, the state may institute prosecution at any time within the newer prescriptive period. *State v. Adkisson*, 602 So. 2d 718 (La. 1992); *State v. Ferrie*, 243 La. 416, 144 So. 2d 380 (1962). In *Ferrie*, the bill of information was filed eight months after the original prescriptive period of one year had expired. However, while the original prescriptive period was still running, it was legislatively extended to two years. *Id.*, 243 La. at 419-20. This Court found that the more recent time limit applied, because the original period was extended before it had expired. *Id.*, 243 La. at 427-28. This Court reasoned that the right against prosecution had not vested because the time limit in effect when the alleged offense occurred had not run when the amendment became effective. *Adkisson*, 602 So. 2d at 719; *Ferrie*, 243 La. at 425.

This assignment of error lacks merit.

APPENDIX C

SUPREME COURT OF LOUISIANA
No. 2005-KA-1981

STATE OF LOUISIANA
v.
PATRICK KENNEDY

CALOGERO, Chief Justice, dissents and assigns reasons.

With the possible exception of *sui generis* crimes against the state involving espionage or treason, the Eighth Amendment precludes capital punishment for any offense that does not involve the death of the victim. Nearly thirty years ago, *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), and its companion decision in *Eberheart v. Georgia*, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 (1977), made that concept clear by striking down the death penalty for the crimes of rape and kidnapping in cases wherein the victims, although experiencing the "ultimate violation of self" short of death, and sustaining severe injuries, did not die. In the context of a rape of a sixteen-year-old juvenile, *Coker*, 433 U.S. at 605, 97 S. Ct. at 2872 (Burger, C.J. dissenting) ("After twice raping this 16-year-old victim, [Coker] stripped her, severely beat her with a club, and dragged her into a wooded area where he left her for dead."), the Supreme Court specifically observed that "the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life." *Coker*, 433 U.S. at 598, 97 S. Ct. at 2869 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S. Ct. 2909, 2931, 49 L. Ed. 2d 859 (1976)). Although drawing support from an apparent widespread legislative rejection of the death penalty for rape in other state jurisdictions at the time, "in the end" the Supreme Court

brought its "own judgment . . . to bear on the question of the acceptability of the death penalty under the Eighth Amendment," *Coker*, 433 U.S. at 597, 97 S. Ct. at 2868, just as, more recently, the Supreme Court brought its independent judgment to bear on the questions of whether the Eighth Amendment precludes capital punishment for mentally retarded offenders, *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), or for offenders under the age of eighteen years when they commit a capital crime. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

Despite recent legislative enactments in other states, nothing approaching a consensus exists in capital jurisdictions on the appropriateness of the death penalty for non-homicide crimes. *Coker* retains its force undiminished today not only because the decision set out a bright-line and easily administered rule, but also because the "abiding conviction" expressed in that decision, *id.*, 433 U.S. at 598, 97 S. Ct. at 2869, has served as the wellspring of the Supreme Court's capital jurisprudence over the past thirty years since *Gregg*. Capital punishment is unique in its severity and irrevocability and it is reserved by the Eighth Amendment for the worst of fully culpable offenders committing the worst crimes different in kind and degree from all others because they result in the taking of human life. *See Roper*, 543 U.S. at 568, 125 S. Ct. at 1194 ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'") (quoting *Atkins*, 536 U.S. at 319, 122 S. Ct. at 2251).

I would adhere to that fundamental principle and therefore respectfully dissent.

APPENDIX D

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE # 041

FROM: CLERK OF THE SUPREME COURT
OF LOUISIANA

On the 29th day of June, 2007, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING(S) DENIED:

1999-KA-0553
STATE OF LOUISIANA v. ANTOINETTE FRANK
(Parish of Orleans)
CALOGERO, C.J., would grant a rehearing.
JOHNSON, J., would grant a rehearing.

2005-KA-1981
STATE OF LOUISIANA v. PATRICK KENNEDY
(Parish of Jefferson)
CALOGERO, C.J., would grant a rehearing.

2005-C -2275
IN RE: MEDICAL REVIEW PANEL PROCEEDINGS
IN THE MATTER OF STEPHANIE NOE
(Parish of Orleans)
CALOGERO, C.J., would grant a rehearing.
KNOLL, J., would grant a rehearing.

OPPOSITION BRIEF

72

(5)

No. 07-343

11-14-07

In The Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the crime of rape of a child with the death penalty.

2. If so, whether Louisiana's capital rape statute genuinely narrows the class of such offenders eligible for the death penalty.

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STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition For Writ of Certiorari through the authority of 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the Eighth Amendment to the Constitution of the United States, and the pertinent provisions of La. R.S. 14:42 set forth in petitioner's Petition for a Writ of Certiorari, the State of Louisiana supplies the Court with the following statutory provision:

> **La. C.Cr.P. art. 905.3. Sentence of death; jury findings** provides:
>
> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and

aggravating circumstances upon which the jury was instructed.

La. C.Cr.P. art. 905.4. Aggravating circumstances provides in pertinent part:

A. The following shall be considered aggravating circumstances:

(1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape . . .

(10) The victim was under the age of twelve years.

STATEMENT OF THE CASE[1]

Petitioner was indicted by a Jefferson Parish grand jury for one count of capital aggravated rape of a child under twelve, a violation of La. R.S. 14:42. Petitioner was tried, convicted and sentenced to death. His conviction and sentence were affirmed by the Louisiana Supreme Court. *State v. Kennedy*, 05-1981 (La. 5/22/07), 957 So.2d 757, reh. denied (La. 6/29/07).

At 9:18 in the morning on March 2, 1998, Patrick Kennedy called 911 to report that his eight-year-old

[1] The testimony and evidence presented at the trial in this matter are recounted in greater detail in the Louisiana Supreme Court's opinion in *State v. Kennedy*, 05-1981 (La. 5/22/07), 957 So.2d 757, 761-773.

step-daughter, L.H. had just been raped.[2] Kennedy advised the 911 operator that L.H. said she had been dragged from her garage to the side yard by two neighborhood boys who then raped her. Kennedy claimed to have seen one of the boys riding away from the house on a bicycle. However, a sheriff's deputy who immediately responded to the complaint from a location only a block away from the defendant's residence, did not see anyone fleeing on a bicycle. The deputy, who arrived on the scene while the defendant was still talking to the 911 operator, noticed that the crime scene in the yard was inconsistent with a rape having occurred there: a dog was sleeping undisturbed nearby and only a small patch of coagulated blood was found in otherwise undisturbed long grass.

The defendant led the deputy to the victim's bedroom, where she was lying on the bed in her room, wearing a t-shirt, and wrapped in a bloody cargo blanket. The defendant, who was wiping his hands with a bloody towel, advised the deputy that he had previously placed the victim in the bathtub in order to clean her, after carrying her like an infant from the side-yard to the residence. The deputy noticed that the defendant had no blood on his clothes. He also noticed that when he attempted to question the victim, the defendant kept trying to answer the questions for her. L.H. eventually indicated that she

---

[2] Kennedy later told detectives that he had kept the victim home from school that morning because she vomited after eating breakfast, and that his wife left for work at 5:30 that morning.

was selling Girl Scout cookies in the garage with her younger brother when two boys dragged her from the garage and one raped her.

When Emergency Medical Services ("EMS") arrived at the residence, Kennedy was found with a basin filled with water which he was using to wipe off L.H.'s genital area. When EMS field supervisor Stephen Brown told him to stop, Kennedy removed the basin, but returned to the room when Brown attempted to question the victim about what happened in order to determine what medical procedures were necessary. Kennedy intervened and provided an account of the incident in the victim's presence.[3] L.H. was transported to Children's Hospital, where she underwent surgery to repair a vaginal injury which had resulted in profuse bleeding.[4] No seminal fluid or spermatozoa was found on any of the swabs taken from the victim at the hospital.

Detectives assigned to investigate the offense caused the neighborhood to be canvassed for a suspect and a bicycle Kennedy described in statements to

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[3] Later, when the lead investigator interviewed the victim at the hospital, the defendant was present, and prompted her to include that the attacker had an earring, and noted that they had seen the attacker cutting grass in the neighborhood previously.

[4] Dr. Scott Benton testified that L.H.'s perineal body was torn all the way from the posterior fourchette, where the vagina normally ends, to the anus. Additionally, a laceration to the left wall of L.H.'s vagina separated her cervix from the back of her vagina, causing her rectum to protrude into her vagina.

detectives. A detective took Kennedy to a local K-Mart in an attempt to locate a bicycle similar to the one he described. However, Kennedy picked out a regular bike with straight handlebars as a similar bicycle, when he had originally described a ten-speed bicycle with the handle bars turned up. On March 3, 1998, Detective Florida Bradstreet interviewed the defendant in connection with her discovery of a bike belonging to sixteen year-old Devon Oatis. The blue, gearless bicycle was found in tall grass behind the apartment where Oatis resided. It was described by Detective Bradstreet as covered with spider webs, rusted, with flat tires, and inoperable. It appeared to have been there for some time as the grass underneath it was indented and dead. The defendant positively identified this bicycle as the one on which he saw the subject ride away. Contrary to his earlier description of the bicycle, before he identified a similar bicycle at K-Mart, this bicycle was not a ten-speed with handle bars turned up, but was a regular bicycle with straight handlebars. Oatis was later ruled out as a subject because his physical description did not match those given by the victim and defendant and because his bicycle was inoperable.

In the meantime, the victim continued to claim that two boys on a bicycle pulled her from the garage and one of them raped her in the yard. Dr. Benton testified that medical records showed that the victim told all hospital personnel this same version of the rape while she was at the hospital, but that she told one family member that the defendant raped her. In addition, several days after the rape, the victim was

interviewed by psychologist Barbara McDermott, and the videotaped interview was introduced by the defense at trial. This interview lasted for three hours over two days.[5] During the interview, the victim said she was playing in the garage with her brother when she was approached by a boy who asked her about Girl Scout cookies. After a long delay, she said she fell off a ledge at the end of the garage and the boy pulled her by the legs across the concrete into the neighbor's yard with the other boy following them. She was trying to grab the grass while he was dragging her. The boy then pulled down his pants and her shorts, placed his hand over her mouth, and "stuck his thing in [her]." She forgot what both boys looked like and did not remember what either boy had on, though she thought one had on a black shirt and blue jeans. She did not remember anything after that until the ambulance arrived. Dr. McDermott questioned the victim thoroughly and argumentatively on each element of the victim's story, telling the victim her story did not make sense. For example, Dr. McDermott asks the victim why she did not suffer abrasions from being dragged across concrete by her legs, and asks her why she did not scream if the attacker's hand was not placed over her mouth until they reached the neighboring yard.

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[5] The Louisiana Supreme Court described the McDermott interviews in detail its opinion in *Kennedy*, 957 So.2d at 765. The first day was devoted primarily to collecting personal and familial history, while the victim was questioned about the rape on the second day.

Despite the victim's version of events, the focus of the investigation began to shift toward the defendant. On March 4, 1998, the police learned about calls the defendant made to his employer on March 2, 1998, hours before he called 911. Alvin Arguello, chief dispatcher for the A. Arpet Moving Co., Patrick Kennedy's employer, testified that when he arrived for work on the morning of March 2, 1998, which was generally around 6:15 a.m., there was a message from Kennedy indicating he would not be available to work that day. Kennedy called Arguello again between 6:30 and 7:30 a.m., sounding nervous, to ask him how to get blood out of a white carpet. Kennedy told Arguello that his step-daughter "had just become a young lady."[6]

On March 9, 1998, the police also found out that Kennedy called B&B Carpet Cleaning at 7:37 a.m. on March 2, 1998 to request urgent carpet cleaning to remove blood stains, almost two hours before he called 911 to complain that the victim had just been raped. Rodney Madere, owner of B&B Carpet Cleaning, testified at trial that the defendant, whom he identified by caller ID, called him at 7:37 a.m. on March 2, to schedule an urgent carpet cleaning job to remove bloodstains. A photograph of the caller ID box from B&B Carpet Cleaners was introduced at trial. Lester Theriot, an employee of B&B testified that Madere called him before 8:00 on the morning of

[6] Arguello could not recall whether Kennedy said his niece or his daughter had "just become a young lady."

March 2, 1998, and told him to report immediately to the defendant's home, but he did not get there until after he dropped his son off at school. When he arrived, he could not get into the home because the police and an ambulance were present.

These calls indicated that the rape occurred much earlier in the morning than reported by the defendant, that he had waited several hours before calling 911, and that he was attempting to clean up evidence of the crime in the meantime. The police also became aware of physical evidence that the crime scene had actually been cleaned. Pursuant to search warrants issued on March 4, 5, 7, and 8, 1998, luminol testing presumptively established the presence of blood on carpeting in areas of the home as reflected in photographs and sketches introduced at trial. A large area of carpet at the foot of the victim's bed was identified in this manner, and a stain was observed on the subfloor following the removal of the carpet and padding. Police also found a one gallon jug container labeled "SEC Steam Low Foam Extraction Cleaner" in the garage, and a pail and two towels were recovered from the bathroom sink.

Samples of several of these items from these locations were subsequently tested by Drs. Henry Lee and Michael Adamowicz of the Connecticut State Police Forensic Science Lab in 1998. Dr. Lee testified that liquid dilution demonstrated that someone had attempted to clean some bloodstains from some of the carpet samples. Dr. Adamowicz found the victim's

DNA on some carpet samples, the cargo blanket, and a towel.

Dr. Lee testified regarding the absence of evidence confirming the defense's theory that the victim was raped in the yard as she initially stated. He examined the shirt and shorts the victim was wearing for any grass or soil stains but could not find any, indicating that the victim was not dragged through the grass as she initially claimed. He also did not find any abrasion marks consistent with being dragged. He opined that blood staining on the back of the victim's shorts was consistent with the shorts being placed on the victim after she was raped. He also examined the victim's underwear and found a blood transfer stain on the back of them and did not find any grass or soil stains on them. He examined photographs of the crime scene outside and found nothing to indicate that a struggle had taken place, as there were no depressions in the grass and only a small blood stain sitting on top of the grass, indicating a low velocity dripping, suggesting that the blood had been planted there.

The victim's mother, C.H., testified at trial that she married the defendant in 1998. After the rape, the victim was removed from her custody for approximately one month because she had permitted the defendant, who was in jail, to maintain phone contact with the victim. C.H. testified that soon after the victim was returned to her custody, the victim for the first time reported to her that defendant had raped her. She testified that the victim was in the

room she shared with her younger brother, crying as her mother had never seen her cry before. After she allowed the victim to come sleep in her room, the victim told her that she could not hold it in anymore, and that that the defendant was the one who raped her.

The victim, who was eight when raped and nearly fourteen years old at the time of trial, testified that she woke up to find Kennedy on top of her. The victim testified that she was interviewed by Amalee Gordon on December 16, 1999. The defense stipulated to the admissibility of the videotape of this interview, which was played for the jury. On the videotape, the victim states that she woke up one morning and Kennedy was on top of her. He raped her, saw that she was bleeding, and called the police after informing her that she had better tell them the story he made up. The victim could not recall what the story was. She stated that it happened in her room, on her bed, with the defendant's hand covering her eyes, while her shorts were off and the defendant was naked. After she was raped, the victim said she fainted and did not remember anything until the ambulance arrived to take her to the hospital.

After this videotape was played, the victim remained on the stand and testified on direct and cross-examination. The victim testified that she originally said two black boys raped her, but that this wasn't true. She said Kennedy told her to say this. She was not downstairs, in the garage, or outside of the house when the rape occurred. After Kennedy

raped her, he left the room and returned carrying orange juice with pills chopped up in it. He gave it to her. She recalled hearing him on the phone telling his boss that his daughter had become a young lady and he couldn't come to work. She also recalled the defendant carrying her into the hall bathroom, where she threw up in the tub. The police came to the house, and she was taken to the hospital where she was given medicine that put her to sleep.

On cross-examination, the victim testified that she remembered telling police and people at the hospital that someone else did this to her, that after the rape the defendant did not live with them anymore, that she had to leave her mother and brother and go live with another family for awhile and this was upsetting to her, and that she first told her mother that the defendant was the one that raped her right before the interview with Amalee Gordon.

LAW AND ARGUMENT

I. The Eighth Amendment's Cruel and Unusual Punishment Clause Permits a State To Punish the Crime of Rape of a Child With the Death Penalty.

In his petition for writ of certiorari, petitioner argues that the Louisiana Supreme Court erred in determining that a sentence of death is not disproportionate or excessive punishment for the rape of a child. He argues that the Louisiana Supreme Court's

decision in the instant case cannot be reconciled with this Court's decision in *Coker v. Georgia*, 433 U.S. 584 (1977). He further contends that objective indicia of national consensus supporting this penalty do not exist. Certiorari should be denied on this issue as the Louisiana Supreme Court correctly determined that the death penalty is not excessive punishment for the rape of a child, and that it is supported by objective indicia of national consensus.

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Eighth Amendment's prohibition of cruel and unusual punishments is "progressive, and . . . not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 366-67 (1910). "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). A punishment is excessive and unconstitutional under the Eighth Amendment if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeful and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. *Gregg v. Georgia*, 428 U.S. 153 (1976) (affirming the death sentence for first-degree murder).

In *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), this Court found death to be a disproportionate penalty for the rape of an adult woman.[7] The plurality opinion stated: "Although rape deserves serious punishment, the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such and as opposed to the murderer, does not take a human life." *Coker*, *supra* at 585. However, as the Louisiana Supreme Court noted in the instant case, the plurality was referring to the rape of an adult woman, and not the rape of a child, as evidenced by the fourteen references to the rape of an "adult woman" found either in the plurality opinion, concurring opinion, or dissenting opinion. *State v. Kennedy*, 05-1981 (La. 5/22/07), 957 So.2d 757, 781; citing *State v. Wilson*, 96-1392 (La. 12/13/96), 685 So.2d 1063, cert. denied sub. nom. *Bethley v. Louisiana*, 520 U.S. 1259 (1997).

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[7] *Coker* was decided by this Court in a plurality opinion. Justice White announced the judgment of the Court, joined by Justices Stewart, Blackmun, and Stevens. Justice Brennan and Justice Marshall filed separate concurring opinions finding the death penalty to be cruel and unusual punishment in all circumstances. Justice Powell concurred in the judgment in part and dissented in part, finding that death is disproportionate punishment for the crime of raping an adult woman where, as in this case, the crime was not committed with excessive brutality and the victim did not sustain serious or lasting injury. Chief Justice Burger dissented, joined by Justice Rehnquist, concluding that he would leave to the States the task of legislating in this area of the law.

The Louisiana Supreme Court addressed the question in the context of this Court's Eighth Amendment jurisprudence, as most recently expressed in the decisions of *Atkins v. Virginia*, 536 U.S. 304 (2002) (exempting mentally retarded persons from capital punishment) and *Roper v. Simmons*, 543 U.S. 551 (2005) (exempting from capital punishment all defendants under the age of 18 years at the time of commission of a capital crime). The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question, which data provides essential instruction. The second part of the analysis involves the exercise of this Court's independent judgment in determining whether the death penalty is a disproportionate punishment for the rape of a child under twelve years of age.[8]

The Louisiana Supreme Court correctly recognized that the first part of this test involves more than simply a numerical counting of which states among the thirty-eight jurisdictions permitting

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[8] The Louisiana Supreme Court noted that in *Stanford v. Kentucky*, 492 U.S. 361 (1989), this Court held that the Court's independent judgment had no bearing on the acceptability of a particular punishment under the Eighth Amendment. However, *Atkins* and *Roper* reaffirmed the Court's view prior to *Stanford v. Kentucky*, *supra*, that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Roper*, 543 U.S. at 563, 125 S.Ct. at 1191-92 (quoting *Atkins*, 536 U.S. at 312, 122 S.Ct. 2242, 153 L.Ed.2d 335 (quoting *Coker*, 433 U.S. at 597, 97 S.Ct. at 2868)).

capital punishment stand for or against a particular capital prosecution. This Court has also taken into account the direction of any change in this respect. In *Atkins*, this Court noted with respect to the number of states that had abandoned capital punishment for the mentally retarded following the Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Eighth Amendment does not bar execution of the mentally retarded) (overruled by *Atkins*), "it is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins*, 356 U.S. at 315. In *Roper*, this Court reinforced the importance of the direction of change to its analysis, finding the fact that five states (four through legislative enactment and one through judicial decision), that had allowed the death penalty for juveniles prior to *Stanford* now prohibited it, constituted a significant trend toward the abolition of the juvenile death penalty. The *Roper* Court concluded that,

> [a]s in *Atkins*, the objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice, provide sufficient evidence that today our society views juveniles, in the words of *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal."

Roper, 543 U.S. at 567.

In the second part of the test, this Court considers whether capital punishment for a particular class

of offenders serves the twin social goals of deterrence and retribution, limiting capital punishment to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319).

Considering the first part of this test, five states, Montana, Georgia, Oklahoma, South Carolina and Texas have enacted legislation prescribing capital punishment for child rape since this Court denied certiorari in *Bethley v. Louisiana*, 520 U.S. 1259 (1997). Montana enacted its child rape capital punishment statute in 1997. Oklahoma and South Carolina adopted their laws in 2006. Texas adopted its law in 2007. The capital child rape statutes of Montana, Oklahoma, South Carolina, and Texas all require proof that the defendant previously had been convicted of sexual assault of a child before he becomes death eligible. See 10 Okl. St. Ann. § 7115(I) (2006 Supp.); Mont. Code Ann. § 45-5-503; S.C. Code Ann. § 16-3-655(C)(1) (2006 Supp.).

With respect to Georgia, the Louisiana Supreme Court noted that it has persistently reenacted its capital rape provision, Ga. Code Ann. § 16-6-1(a)(1), although some forty years have passed since the decision in *Coker*, and despite the fact that the courts of the state readily acknowledge that while the offense remains classified as a capital crime for procedural purposes, the death penalty is not available when the victim is an adult woman. *Kennedy*, 957 So.2d at 784-85; citing *Merrow v. State*, 268 Ga. App.

47, 601 S.E.2d 428 (2004). In 1999, the Georgia legislature added subsection (1)(a)(2), which proscribes the carnal knowledge of a female less than 10 years old as a capital offense.

The Louisiana Supreme Court determined that it was also appropriate to consider the number of jurisdictions which provide capital punishments for non-homicide crimes which are far less heinous than child rape.[9] This determination correctly recognizes the fact that the legislative enactments of these additional jurisdictions demonstrate that there is not a national consensus that the death penalty is disproportionate for non-homicide crimes. The Louisiana Supreme Court noted:

> most [commentators] agree that the number of jurisdictions allowing the death penalty for non-homicide crimes at least doubled between 1993 and 1997. Kearns, 58 S.C. L. Rev. at 520, 521, and n. 110 (citing Meister, *supra* note 108, at 210-21 and Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship,* 4 Wm. & Mary J. Women & L., 129, 160-61 (1997) (noting that in 1993, at least six states authorized death for non-homicide crimes, and by 1997, that number had grown to fourteen)).

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[9] Relying upon this Court's characterization of rape as the ultimate violation of self, short of homicide, the Louisiana Supreme Court found child rape to be the most heinous of all non-homicide crimes. *Kennedy*, 957 So.2d at 785; citing *Coker*, *supra*, 433 U.S. at 597.

Kennedy, 957 So.2d at 785-86. Conducting its own survey, the Louisiana Supreme Court found that approximately 38% of capital jurisdictions (15 out of 39, including federal) authorize some form of non-homicide capital punishment:

> Five provide capital punishment for child rape, as discussed above. Five more provide the death penalty for sui generis extraordinary crimes against the government, *i.e.*, treason, espionage, aircraft piracy. *See* Ark. Code Ann. § 5-51-201 (Michie 1997); Cal. Penal Code § 37 (West 1999); Miss. Code Ann. §§ 97-7-67, 97-25-55 (West 2003); N.M. Stat. Ann. § 20-12-42 (Michie 1989); Wash. Rev. Code Ann. § 9.82.010 (West 2006 Supp.) [footnote omitted] Four states provide capital punishment for aggravated kidnapping offenses similar to Louisiana's (non-capital) crime of aggravated kidnapping in R.S.14:42. *See* Colo. Rev. Stat. Ann. § 18-3-301; Idaho Code, §§ 18-4502, 18-4504 (Michie 2000); Mont. Code Ann. 45-5-503 (West 2005); S.D. Codified Laws § 22-19-1 (Michie 1998).
>
> . . .
>
> Florida remains among the ranks of non-homicide capital jurisdiction because of its sweeping drug laws which provide for capital punishment in extreme cases even when the offense does not result in the actual death of anyone. *See, e.g.* Fla. Stat. Ann. § 893.135(3) (West 2007 Supp.) (importation of 300 or more kilograms of cocaine into the state when the offender "knows that the probable

> result of such importation would be the death of any person"); *see also* Fla. Stat. Ann. § 921.142(1) ("The Legislature finds that trafficking in cocaine or opiates carries a grave risk of death or danger to the public; that a reckless disregard for human life is implicit in knowingly trafficking in cocaine or opiates; and that persons who traffic in cocaine or opiates may be determined by the trier of fact to have a culpable mental state of reckless indifference or disregard for human life."). Thus, 14 of the 38 states permitting capital punishment provide the death penalty for non-homicide crimes: Louisiana, Oklahoma, South Carolina, Georgia, Arkansas, California, Mississippi, New Mexico, Washington, Colorado, Idaho, Montana, South Dakota, and Florida.
>
> At the federal level, of the 39 crimes carrying the death penalty, excluding the extraordinary crimes of treason and espionage, the overwhelming majority require the death of a person. However, 18 U.S.C. 3591(b)(1) and 21 U.S.C. 848(e) combine to provide capital punishment for the kingpin of an extraordinarily large continuing criminal drug enterprise.

State v. Kennedy, 957 So.2d at 786-787. The Louisiana Supreme Court did not include Texas, which enacted its capital child rape statute in 2007, in the list of jurisdictions authorizing the death penalty for non-homicide offenses. *See,* Tex. Pen. Code § 12.42 (2007 Supp.). Therefore, it now appears that approximately

41% of capital jurisdictions (15 out of 39, including federal) authorize the death penalty for non-homicide offenses.

The trend toward capitalization of non-homicide crimes, child rape in particular, is significant. The Louisiana Supreme Court noted that this trend is more compelling than in *Roper*, wherein this court relied on five states abolishing the death penalty for juveniles after *Stanford* held that the death penalty for juveniles was constitutional. *Kennedy*, 957 So.2d at 788. In the instant case, six states have now enacted the death penalty for child rape after this Court held that the death penalty for rape of an adult woman was unconstitutional. Additionally, "it is likely that the ambiguity over whether *Coker* applies to all rape or just adult rape has left other states unsure of whether the death penalty for child rape is constitutional." *Kennedy*, 957 So.2d at 788.

Of significance, the respondent contends that the fact that the petitioner is the first to be sentenced to death under the existing child rape statutes does not indicate that juries are unwilling to return death sentences for convicted child rapists. Three of the jurisdictions at issue, South Carolina, Oklahoma, and Texas, have only enacted their legislation within the past two years. When one considers the fact that extensive pre-trial litigation in the instant case resulted in a delay of more than five years from petitioner's indictment on May 7, 1998, to his conviction in August of 2003, it is not surprising that death

sentences have not yet been returned in these jurisdictions.

Considering the second prong of the test, the Louisiana Supreme Court concluded that the death penalty was not a disproportionate penalty for the rape of a child under twelve:

> Rape of a child under the age of twelve years of age is like no other crime. Since children cannot protect themselves, the State is given the responsibility to protect them. Children are a class of people that need special protection; they are particularly vulnerable since they are not mature enough nor capable of defending themselves. A "maturing society," through its legislature has recognized the degradation and devastation of child rape, and the permeation of harm resulting to victims of rape in this age category. The damage a child suffers as a result of rape is devastating to the child as well as to the community.

Kennedy, 957 So.2d at 789. The Louisiana Supreme Court further noted that the harm inflicted upon a child when raped is tremendous, that sex offenses against children cause untold psychological harm not only to the victim but also to generations to come, and that aggravated rape inflicts mental and psychological damage to its victims and undermines the community sense of security. *Kennedy*, 957 So.2d at 789, fn. 39.

Moreover, child rapists as a class of offenders, share no common characteristics tending to mitigate

the moral culpability of their crimes. Execution of child rapists will serve the goals of deterrence and retribution as well as the execution of first-degree murderers. *Kennedy*, 957 So.2d at 789.

Respondent submits that the Louisiana Supreme Court correctly found that the death penalty is not excessive punishment for the rape of a child, and that certiorari should be denied on this basis.

II. Louisiana's Capital Rape Statute Genuinely Narrows the Class of Offenders Eligible for the Death Penalty.

Petitioner argues that even if this Court determines that death is a permissible punishment for the rape of a child under certain circumstances, Louisiana's capital rape statute fails to genuinely narrow the class of offenders eligible for the death penalty. This claim has no merit.

In order to avoid arbitrary and capricious imposition of the death penalty, the sentencing jury's discretion must be suitably directed and limited. *Gregg v. Georgia*, 428 U.S. 153, 189, 92 S.Ct. 2909, 2932-2933, 49 L.Ed.2d 859 (1976). The capital sentencing scheme must narrow the class of persons eligible for the death penalty. The narrowing can be done in one of two ways: (1) the legislature may itself narrow the definition of capital offenses, or (2) the legislature may broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. *State v. Wilson*, 96-1392 (La.

12/13/96), 685 So.2d 1063, 1070-71, citing *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Louisiana has chosen the first method. The legislature has narrowly defined the offenses which are punished by death, therefore the "narrowing function" is performed by the jury at the guilt phase when it finds the defendant guilty of the aggravated rape of a child under the age of twelve.

Accordingly, this Court found in *Lowenfield* that a sentence of death may validly rest upon a single aggravating circumstance under La. C.Cr.P. art. 905.4 that is a necessary element of the underlying offense of first degree murder under La. R.S. 14:30. *Lowenfield*, 484 U.S. at 246. While the scheme narrowed the class of eligible offenders at the guilt phase, the sentencing phase allowed for the consideration of mitigating circumstances and discretion. *Id.* This Court stated that "[t]he Constitution requires no more." *Id.*

La. R.S. 14:42, as it read at the time of trial, defined aggravated rape as "a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed . . . [w]hen the victim is under the age of twelve. . . . "[10] When the victim is under the age of twelve, La. R.S. 14:42(D)(2) authorizes the death penalty. All other cases of aggravated rape are punishable by "life imprisonment at hard labor without

[10] La. R.S. 14:42(A)(4) was amended in 2003 to substitute thirteen years for twelve years.

benefit of parole, probation, or suspension of sentence." La. R.S. 14:42(D)(1).

La. C.Cr.P. art. 905.3 provides:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The Court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

Included as aggravating circumstances are that "the offender was engaged in the perpetration or attempted perpetration of aggravated rape," and the "victim was under the age of twelve years . . . " La. C.Cr.P. art. 905.4(A)(1) and (10).

Thus, certiorari should be denied because the Louisiana scheme genuinely narrows the class of death eligible rapists to those who rape young children under twelve, and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion.

CONCLUSION

The petitioner has failed to show that any of the issues raised herein necessitate the granting of certiorari. The State of Louisiana requests that, for the foregoing reasons, the petition for writ of certiorari be denied.

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REPLY BRIEF

(17)

No. 07-343

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IN THE

Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari
to the Louisiana Supreme Court

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REPLY BRIEF FOR PETITIONER

The State does not dispute that this case, in which petitioner stands to be the first and only person in this country in over forty-three years to be executed for rape, presents two Eighth Amendment issues of exceptional importance – namely (1) whether the Eighth Amendment permits child rape to be punished by death; and (2) even if so, whether Louisiana's capital child-rape law genuinely narrows the class of such offenders eligible for the death penalty. Nor does the State contest that the Louisiana Supreme Court's resolution of these questions conflict with all six decisions from other state courts of last resort to address the same or similar issues. Nor does the State dispute that this case presents an ideal vehicle for resolving the questions presented. Nor does the State take issue with any of the arguments that petitioner (now supported by *amici* from various perspectives) advances with respect to why it is so vital that this Court resolve the questions presented now.

The only argument the State offers for denying certiorari is a recitation of the Louisiana Supreme Court's decision. Petitioner already has explained why that decision contravenes this Court's precedent, *see* Pet. for Cert. 12-16 & 22-25, and petitioner will not repeat those explanations here. It suffices to reiterate that even the Louisiana Supreme Court conceded that its ruling was in serious tension with this Court's decision in *Coker v. Georgia*, 433 U.S. 584 (1977), *see* Pet. App. 54a-56a, and that "the ambiguity over whether *Coker* applies to all rape or just adult rape has left other states unsure of whether the death penalty for child rape is unconstitutional." Pet. App. 55a, *quoted in* BIO at 20. Only this Court can resolve that supposed ambiguity over this tremendously important issue. This Court should do so now, making clear that child rape cannot be punished by death and that even if it could, the Louisiana Supreme Court's rendering of the Eighth Amendment's "narrowing" requirement as a nullity cannot stand.

CONCLUSION

For the foregoing reasons as well as those in the petition for certiorari, the petition for a writ of certiorari should be granted.

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November 2007

AMICUS CURIAE BRIEF

MOTION FILED
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No. 07-343

IN THE

Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

MOTION AND BRIEF AMICI CURIAE OF LOUISIANA PUBLIC DEFENDER OFFICES IN PARISHES IMPACTED BY HURRICANES KATRINA AND RITA

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, the public defenders of Jefferson, Calcesieu, and Orleans Parishes, Louisiana, move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has refused consent.

Under La. R.S. 14:42, Louisiana prosecutors may seek the death penalty for the rape of a child under thirteen years of age. *Amici* are required to expend millions of dollars defending capital rape prosecutions in such cases while the constitutionality of the death penalty for child rape remains in question, and even though in the vast majority of child-rape prosecutions, the State reduces the charge to a non-capital prosecution, but only on the eve of trial. Making such expenditures has been particularly difficult since Hurricanes Katrina and Rita ran roughshod over *Amici*'s parishes in August and September of 2005.

Amici, therefore, have a strong institutional interest in the resolution of the questions raised by the petitioner concerning the constitutionality of the capital rape statute in Louisiana. Accordingly, *Amici* should be granted leave to file the attached *amici curiae* brief, which demonstrates the financial hardships *Amici* bear in light of the uncertainty of

the constitutionality of Louisiana's capital rape statute.

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November 13, 2007

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are statutorily-created offices charged with the responsibility of representing indigent defendants, including those charged capitally under La. R.S. 14:42. ***Amici*** have public defender offices covering Jefferson Parish, Calcesieu Parish, and Orleans Parish, locations devastated by Hurricanes Katrina and Rita.

Because of the availability of the death penalty under La. R.S. 14:42, ***Amici*** are required to expend millions of dollars defending capital prosecutions even though prosecutors in their parishes have never persisted in seeking the death penalty against any defendant charged under La. R.S. 14:42 through a capital penalty phase. ***Amici*** are particularly hard-pressed to make such expenditures after Hurricanes Katrina and Rita ran roughshod over their parishes in August and September of 2005.

The indigent defense system throughout Louisiana was severely stretched and challenged prior to Hurricane Katrina and Rita. ***See State v. Citizen***, 898 So.2d 325, 327, 335 n.11 (La. 2005) (pointing out that state legislature has "failed to provide adequate appropriation to support" indigent defense; citing testimony from director of state

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[1] Pursuant to Rule 37.3, the letter signifying petitioner's consent to the filing of this brief is on file with the Clerk of the Court. Pursuant to Rule 37.6, counsel for ***amici curiae*** state that no counsel for a party authored this brief in whole or in part, and no person other than ***Amici*** or their counsel made a monetary contribution to this brief.

Indigent Defense Assistance Board "that the state reduced his agency's funding by 25% after its first year of existence, then failed to restore funding to previous levels in the seven subsequent years"); National Legal Aid and Defender Association, ***In Defense of Trial-Level Indigent Defense Services in Louisiana 40 Years After Gideon***, 32-41 (March 2004) (discussing "crushing caseloads" of public defenders in Avoyelles Parish); Greenlee, ***The Louisiana Indigent Defense Assistance Board***, La. Bar Journal, Vol. 50, No. 2, 97,101 (August/September 2002) (article by the director of the Louisiana Indigent Defense Assistance Board (LIDAB) noting that "economic problems have exacerbated the state's already overburdened indigent defense system" and concluding that "the indigent system cannot continue to provide quality service given the current drain on available funds"); ***Justice in Louisiana, Indigent Defense in Louisiana***, La. Bar Journal, Vol. 50, No. 2, at 96 (August/September 2002) (noting "lack of adequate funding" for indigent defense).

The hurricanes greatly exacerbated an already dire situation. ***See, e.g.***, National Legal Aid & Defender Association, ***A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana's Criminal Courts*** iv (September 2006) (explaining that "it would be disrespectful to those ... individuals trying to keep the system afloat to suggest that Katrina was ***solely*** responsible for the systemic collapse of justice in New Orleans. The New Orleans justice system had long-standing, pre-existing systemic deficiencies that were unmasked and accentuated by the catalyst Katrina.... Pre-Katrina, the public defender system in New Orleans was not obligated to adhere to any national, state or local

standards of justice resulting in public defenders handling too many cases, with insufficient support staff, practically no training or supervision, experiencing undue interference from the judiciary, all while compromising their practices by working part-time in private practices to augment their inadequate compensation.... In the aftermath of the storm things only got worse.").

Amici have a strong institutional interest in the resolution of the questions raised by the petitioner concerning the constitutionality of the capital rape statute in Louisiana.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* now to address and resolve the constitutionality of the death penalty for non-homicide child rape.

In Louisiana, La. R.S. 14:42 renders every defendant charged with the rape of a child under the age of thirteen death eligible, including those charged with oral sexual battery of a child under 13.

Under Louisiana law, the prosecution has complete discretion to determine when and how to prosecute. Prosecutors have continued to seek death against defendants charged under La. R.S. 14:42 through a capital penalty phase in only three cases, all from Jefferson Parish.[2] In the vast majority of child-rape prosecutions, the State reduces the charge to a non-capital prosecution, but only on the eve of trial. (This eleventh-hour maneuver allows the State

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[2] Two of these cases resulted in life sentences. Only Patrick Kennedy has received a death sentence.

to obtain convictions by non-unanimous jury verdicts. *See* La. C. Cr. P. art. 782(A).)

Louisiana Public Defender Offices are currently obligated to provide capital representation to all indigent defendants facing capital rape prosecutions, regardless of the likelihood that prosecutors will eventually decide not to pursue a death sentence.

The defense of potential death penalty cases under La. R.S. 14:42 requires vast expenditures out of the offices' extremely limited budgets. As a result, Public Defender Offices are forced to make extremely difficult resource allocation decisions that affect all of their clients, both those facing capital prosecutions and those facing non-capital prosecutions.

Delay in deciding this case will force *Amici* to continue to expend a crippling proportion of already scant resources on the defense of defendants charged capitally under La. R.S. 14:42.

ARGUMENT

The Court Should Grant Certiorari Now, as Amici – and the Criminal Justice System throughout Louisiana -- Bear the Cost of the Continued Confusion Concerning the Constitutionality of the Death Penalty for the Rape of a Child

Although Louisiana prosecutors have decided not to seek the death penalty in all but three child rape cases,[3] they have almost invariably delayed making this decision until the eve of trial.[4] As a result, defender offices are compelled to expend vast amounts of their scarce resources on cases arising under La. R.S. 14:42.

1. In Louisiana, the prosecution has the power to decide whether (and when) to proceed capitally in a case of aggravated rape of a child. *Amici* do not dispute the prosecution's authority to make this determination and, indeed, a recent appellate court upheld that authority. *State v. Mizell*, 938 So. 2d 712, 714 (La. App. 1st Cir. 2006).

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[3] *See* n.2, *supra*, and accompanying text. In the remaining cases, the prosecution's decision to proceed non-capitally permits the prosecution to secure a non-unanimous guilty verdict. La. C. Cr. P. art. 782(A).

[4] The Sentencing Review Memorandum filed by Petitioner in the Louisiana Supreme Court identifies one hundred and eighty (180) aggravated rape prosecutions which resulted in a life sentence. In one hundred and seventy-seven (177) of those instances, the State reduced charges, proceeded non-capitally, or accepted a plea. *Amici* feel safe to say that this number vastly underestimates the true numbers as the Sentence Review Memorandum identifies no cases from Orleans Parish because officials in that parish refused to provide the requested information to petitioner.

Prosecutors have continued to seek death against defendants charged under La. R.S. 14:42 through a capital penalty phase in only three cases, all from Jefferson Parish. *See* n.2, supra. In all other child-rape prosecutions, the State has decided not to seek the death penalty, but in general only on the eve of trial.

Because of defendants' exposure to the death penalty until the eve of trial, however, *Amici* are required to defend these cases as capital prosecutions until the prosecution announces its decision to forgo death.

2. The defense of potential death penalty cases under La. R.S. 14:42 requires vast expenditures out of the offices' extremely limited budgets. *Amici* are particularly hard-pressed to make such expenditures after Hurricanes Katrina and Rita ran roughshod over their parishes in August and September of 2005. Public Defender Offices are forced to make extremely difficult resource allocation decisions that affect all of their clients, both those facing capital prosecutions and those facing non-capital prosecutions.

Amici bear tremendous additional costs in defending these potentially capital cases. In Louisiana, capital cases require: the appointment of two lawyers (*see* Louisiana Indigent Defender Board Standard ("LIDBS") 7-8.1); the appointment of a senior experienced lawyer (LIDBS 7-2.1); and significantly reduced case loads for the lawyers (LIBDS, 12-2.1). In addition, the defense of capital cases requires an exhaustive mitigation investigation into the defendant's life. *See, e.g., ABA Guidelines for the Appointment and Performance of Counsel in*

Death Penalty Cases §4.1 (rev'd ed. 2003), *reprinted in* 31 HOFSTRA L. REV. 913, 959 (2003).

Cases of unusual complexity present additional costs. Such cases typically involve: 1) allegations of child rape in multiple jurisdictions, and/or 2) delayed reporting of the rape, which renders investigation especially lengthy and time-consuming, and/or 3) substantial difficulties in unearthing and deciphering mitigation histories.

To take one example, thus far in 2007, the costs of representing one post-Katrina appointed case in Orleans Parish have been approximately $140,000, including:

$50,000 for mitigation investigation; and

$32,000 for lead counsel; and

$58,000 for associate counsel.

In 2007, in Orleans Parish alone, there have been at least 32 pending capital aggravated rape cases. *See* Appendix A (collecting case data). Paying qualified defense attorneys for those thirty cases at the bare minimum price of $77,000 per case per annum[5] would cost nearly 2.5 million dollars

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[5] On average, capital aggravated rape cases take far more than a year to be resolved. For the purpose of this calculation, however, an average of a year is assumed. Because the Orleans Public Defender cannot afford to pay the salary the market demands for qualified capital counsel, it is forced to pay private attorneys $110 per hour for their representation (a rate low by market standards for the lead counsel and barely adequate for the associate counsel). Under prevailing standards of practice in Louisiana, capital defense attorneys can handle a maximum of five capital cases per year (with a recommended range of 3 to

(precisely $2,464,000). This is more than ninety percent (90%) of the budget for the entire Orleans Parish Public Defender office.[6] And this figure does not even account for the additional substantial cost of adequate mitigation investigation.

Information concerning the exact number of capital rape prosecutions elsewhere in the State is currently unavailable.[7] However, *Amici* are aware

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5). LIDBS 12-2.1. At least two attorneys must be assigned to each case. LIBDS 7-8.1. A team of two attorneys working full time for an entire year, therefore, could represent a maximum of five capitally-charged clients. Assuming they work only 35 hours per week for 50 weeks, the annual cost for those five clients would be $385,000 (2 * 35 * 50 * 110). The cost per case is $77,000. This figure is low compared to defense costs in other jurisdictions. *See, e.g., State v. Robert Young & Reis Lopez*, Slip. Op. No. 29,467 (N.M. 2007) (noting testimony of defense attorney that cost of defense in complicated capital case would be one million dollars per defendant) (available at http://www.supremecourt.nm.org./cgi-bin/dnloadit.cgi/slipopinions/SC29,467.html) (last visited Nov. 10, 2007).

[6] A report prepared after Hurricane Katrina by the Department of Justice, Bureau of Justice Affairs, noted that the budgetary needs of the Orleans public defender system were approximately eight million dollars ($8,000,000). Nicholas Cbiarkis, D. Alan Henry, & Randolph Stone, *An Assessment of the Immediate and Longer-Term Needs of the New Orleans Public Defender System*, Study of the Bureau of Justice Initiative National Training & Technical Assistance Initiative Project at American University, 26 (2006) (available at http://www.lajusticecoalition.org/reports+resources/studies/) (last visited Nov. 10, 2007). The Orleans Public Defender currently receives approximately one-third of that amount.

[7] The Louisiana Indigent Defense Assistance Board has a statistical page indicating the capital cases in Louisiana. It does not appear to differentiate between murder and aggravated rape cases, and appears not to have been updated

that their own current case loads involving numerous potentially capital aggravated rapes impose crushing financial burdens on them and on defense efforts to improve an indigent defense system already in crisis mode.

3. Delay in deciding this case will force ***Amici*** to continue to expend a crippling proportion of already scant resources on the defense of defendants charged capitally under La. R.S. 14:42.

Therefore, this Court should grant the petition for writ of certiorari and resolve the constitutionality of La. R.S. 14:42.

CONCLUSION

For the foregoing reasons, Amici respectfully suggests that the petition for a writ of certiorari be granted.

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since 2002. ***See*** http://www.lidab.com/Capital%20Trial%20Chart.html (last visited Nov. 9, 2007)

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AMICUS CURIAE BRIEF

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No. 07-343

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IN THE

Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with a direct national membership of over 12,000 attorneys, in addition to more than 35,000 affiliate members from all 50 states.[1] Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files amicus curiae briefs on various issues in this Court and other courts and has filed amicus curiae briefs in previous cases involving Eighth Amendment limitations on capital sentences. *See, e.g., Roper* v. *Simmons*, 543 U.S. 551 (2005).

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

INTRODUCTION

Amicus agrees with Petitioner that this Court should grant a writ of certiorari on the questions presented in the petition. Amicus submits this brief to highlight an additional reason that review of this case is appropriate and important.

This Court has consistently sought to ensure that the death penalty is applied cautiously and fairly, only to the worst of the worst offenders. *See, e.g.*, *Roper* v. *Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (quoting *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002))). In addition, this Court has repeatedly stressed the need for heightened reliability in capital cases. *See, e.g.*, *Johnson* v. *Mississippi*, 486 U.S. 578, 584 (1988).

There can be no such assurance where death is a permissible punishment for child rape. Convictions for child rape often rest principally on the testimony of children. Such testimony is often unreliable because many children are susceptible to suggestion; they may confuse the suggestions of others with authentic memories; their stories may change dramatically depending upon when and by whom they are interviewed; and they recant their allegations—whether those stories inculpate or exculpate the defendant—at alarmingly high rates. The unreliability of such testimony is confirmed by over three centuries of experience with child testimony and the recantations that frequently follow. Given the reliability problems inherent in child testimony, it is far too likely that death sentences for child rape will be meted out on the innocent. The heightened risk of erroneous convictions in cases resting on juvenile testimony provides a compelling reason to grant certiorari and clarify that the Constitution does not permit the imposition of the death penalty for child rape which does not result in the death of the victim.

ARGUMENT

This Court has consistently held that the Eighth Amendment demands heightened reliability in capital cases in part to guard against the risk that an innocent defendant might be put to death. *See Johnson* v. *Mississippi*, 486 U.S. 578, 584 (1988) ("[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case" (quoting *Gardner* v. *Florida*, 430 U.S. 349, 363-364 (1977) (White, J., concurring in judgment))); *see also Herrera* v. *Collins*, 506 U.S. 390, 407 n.5 (1993) (acknowledging "the importance of ensuring the reliability of the guilt determination in capital cases in the first instance"). This Court has therefore sought "measured, consistent application and fairness to the accused." *Eddings* v. *Oklahoma*, 455 U.S. 104, 111 (1982). Against this backdrop, cases involving child rape too often lack the reliability needed for the irremediable penalty of death. That contention is not intended to diminish in any way the utter repugnance and reprehensibility of sexual violence against children. Rather, it rests simply on a recognition that the most common evidence relied upon in child rape cases—child testimony—produces unacceptably high risks of erroneous convictions for a death-eligible crime, particularly when combined with the special methods of proof that courts have approved to govern such cases.

Child sexual abuse convictions are often "based primarily, if not solely, on the word of the victims involved." Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2118 (1996). Cases like Petitioner's are frequently "'she said, he said' cases that ultimately rely upon the jury's assessment of the relative credibility of opposing witnesses." *Ex parte Thompson*, 153 S.W.3d 416, 422 (Tex. Crim. App. 2005) (Cochran, J., concurring). Mistakes are inevitable in such cases, for as "[a]ny parent who has ever attempted to resolve a sibling quarrel based upon 'he said, she said' versions

of a single event knows...[,] even a parent can, from time to time, make a credibility mistake and believe a child's inaccurate version of the event." *Id.*

The dangers generally presented by "he said, she said" cases are greater when the crucial witness is a child. History is replete with examples of damning false accusations made by children, from the Salem witch trials to the McMartin preschool case in Manhattan Beach, California in the late 1980s, to "the tragic Scott County investigations of 1983-1984, which disrupted the lives of many (as far as we know) innocent people in the small town of Jordan, Minnesota." *Maryland* v. *Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting); *see* Ceci & Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 Psychol. Bull. 403, 405 (1993) (Salem); Anderson, 69 S. Cal. L. Rev. at 2117 (Manhattan Beach).[2] These historical examples reflect the heightened reliability problems inherent in child testimony—young children may be particularly susceptible to suggestion; they may confuse the suggestions of others with authentic memories; and their stories may change dramatically from interview to interview. Courts and judges have long recognized these problems. *See Coy* v. *Iowa*, 487 U.S. 1012, 1020 (1988) (acknowledging the risks of child "false accuser[s]" and "coach[ing] by a malevolent adult"); *Arizona* v. *Youngblood*, 488 U.S. 51, 72 n.8 (1988) (Blackmun, J., dissenting) ("Studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults."); *Craig*, 497 U.S. at 868 (Scalia, J., dissenting) (noting "'special' reasons" to be suspicious of child testimony, for "studies show that children are substantially more vulnerable to suggestion

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[2] It is unsurprising in this regard that more than half of the heralded sexual abuse convictions obtained against daycare professionals in the 1980s were later overturned on appeal. *See* Hayward & Mashberg, *Upheaval in '80s Put the Spotlight on Child Abuse*, Boston Herald, Dec. 3, 1995, at 23; *cf.* Goldberg, *Youths' 'Tainted' Testimony is Barred in Day Care Retrial*, N.Y. Times, June 13, 1998, at A6 (noting several reversals of convictions in sexual abuse trials).

than adults, and often unable to separate recollected fantasy (or suggestion) from reality" (citing studies[3])).

The academic literature confirms the dangers courts have perceived. To be sure, children are capable of accurately recalling events and honestly testifying to those recollections. But young children are particularly susceptible to suggestion in circumstances that are common to cases involving allegations of child sexual abuse, such as repeated questioning or other forms of pressure by parents or other authority figures. *See, e.g.*, Ceci, Bruck, & Rosenthal, *Children's Allegations of Sexual Abuse: Forensic and Scientific Issues*, 1 Psychol., Pub. Pol'y & L. 494, 506 (1995) ("No one familiar with the scientific research ought to doubt that some children could be brought to make false claims of sexual abuse if powerful adults pursue them repeatedly with ... [suggestive] enjoinders"). Indeed, "[e]ven strong prosecution advocates acknowledge that false sexual abuse claims are more likely in some situations than others, particularly in situations where the dominant motives tilt children in that direction (e.g., in acrimonious custody cases in which a custodial parent has relentlessly 'lobbied' a child)." *Id.* at 505. It is thus hardly surprising that there is a "*consensus* in the social-science literature" that children may offer testimony that is so substantially shaped by the suggestions of adults as to be unreliable. Anderson, 69 S. Cal. L. Rev. at 2146 (emphasis added).[4]

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[3] The studies cited in Justice Scalia's dissent include Lindsay & Johnson, *Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources*, in *Children's Eyewitness Memory* 92 (Ceci, Toglia & Ross eds. 1987); Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution; Should Children Really Be Seen and Not Heard?*, 14 Am. J. Crim. L. 227, 230-233 (1987); Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 Wash. L. Rev. 705, 708-711 (1987).

[4] *See also id.* ("Although widespread disagreement abounds about just how suggestible children are, several studies demonstrate that children may lie if they are motivated to do so, that they are susceptible to

The susceptibility problem is amplified when children are interviewed under suggestive circumstances, a not infrequent occurrence. Thus, child testimony is only reliable when it is elicited by "unbiased, neutral interviewers, when the number of interviews [and] leading questions are kept to a minimum, and when there is an absence of threats, bribes, and peer pressure." Myers, Cordon, Ghetti & Goodman, *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 L. & Contemp. Probs. 3, 30 (2002). Unfortunately, the use of reliability-enhancing safeguards is far from universal—research shows that "some particularly troublesome techniques, though usually constituting a small part of the interaction in any given interview, are extremely common." Ceci & Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 66 n.168 (2000). The result is a disturbingly high rate of erroneous accusations—without adequate procedures to prevent improper suggestion, children commit errors more often than not. *See id.* at 54 (noting that "numerous studies show that when children are exposed to these forms of suggestion the error rates can be very high, sometimes exceeding 50%").

The unreliability of child testimony is reflected in the alarming rate at which children recant sexual abuse accusations. While studies have yielded divergent levels of recantation,[5] a number have found that more than 20% of children recant their allegations of sexual abuse. *See* Malloy, Lyon, & Quas, *Filial Dependency & Recantation of Child Sexual Abuse Allegations*, 46 J. Am. Acad. Child & Adolesc. Psychiatry 162, 165 (Feb. 2007) (finding a recantation rate of

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adapting their reports to fulfill the perceived expectation of the adult interviewer, and that inappropriate postevent inquiries can actually alter a child's memory for an event.").

[5] *See, e.g., United States* v. *Rouse*, 329 F. Supp. 2d 1077, 1080 (D.S.D. 2004) (summarizing expert witness testimony that "published studies show the rate of recantation varies from 3% to 27% of children who have reported sexual abuse").

23.1%); London, Bruck, Ceci, & Shuman, *Disclosure of Child Sexual Abuse—What Does the Research Tell Us About the Ways That Children Tell?*, 11 Psych., Pub. Pol'y. & L. 194, 216 (2005) (citing studies that yielded recantation rates of 27% and 22%). Some studies suggest that "high recantation rates reflect the number of children who attempt to discredit their own previous false allegations by setting the record straight." London et al., 11 Psych., Pub. Pol'y. & L. at 216; *see also Ex parte Thompson*, 153 S.W.3d 416, 423 n.9 (Tex. Crim. App. 2005) (Cochran, J., concurring) (citing cases). Other studies suggest that recantation frequently occurs when a parent pressures a child to withdraw a truthful allegation. *See* Malloy et al., 46 J. Am. Acad. Child & Adolesc. Psychiatry at 167. Children's susceptibility to pressure—both to bring false allegations and to recant truthful ones—adds a degree of unreliability that is at war with the level of certainty this Court has demanded in the capital punishment context.

The reliability problems described above are compounded by the evidentiary procedures employed in many child rape cases. The Sixth Amendment's Confrontation Clause generally prohibits the introduction of testimonial out-of-court statements against the accused if the declarant is unavailable for cross-examination. *Crawford* v. *Washington*, 541 U.S. 36, 65 (2004). This rule ordinarily provides defendants the right to cross-examine their accusers face-to-face. *See Coy* v. *Iowa*, 487 U.S. 1012, 1016 (1988). The right to confront one's accuser, however, is limited as applied to child witnesses. In *Maryland* v. *Craig*, 497 U.S. 836 (1990), this Court validated the use of procedures designed to protect child witnesses from the trauma that may be caused by testifying in open court. Where the potential for such trauma exists, this Court held, states may use procedures that satisfy the Confrontation Clause by methods of "rigorous adversarial testing" other than "face-to-face confronta-

tion," such as the use of testimony via closed circuit television. *Id.* at 857.[6]

In addition to convictions based on the admission of child testimony that is not subject to traditional face-to-face cross-examination, convictions based on certain forms of hearsay also remain all-too common in child rape and sexual abuse cases. *See* Raeder, *Symposium, Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 Ind. L.J. 1009, 1009 (2007) ("In practice, hearsay is a dominant feature of child abuse litigation, primarily introduced in the context of excited utterances, statements for medical diagnosis or treatment, forensic interviews, or via *ad hoc* exceptions."). Courts admit hearsay by finding that the statement in question—such as an accusatory declaration made by a child to a family member or medical examiner—constitutes admissible nontestimonial hearsay under *Crawford*. *See, e.g.*, *People* v. *Geno*, 261 Mich. App. 624, 631 (2004) (admitting a child's out-of-court statement to the director of a children's sexual assault center on the grounds that it was nontestimonial under *Crawford*); *State* v. *Vaught*, 682 N.W.2d 284, 291 (Neb. 2004) (alleged victim's statement to a doctor nontestimonial and therefore admissible under *Crawford*). They also admit hearsay statements that are plainly testimonial—such as those made during an *ex parte* interview conducted by a state official—when the declarant child is "available" for cross-examination, despite the fact that many young children lack the memory, communication skills, or composure

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[6] *Crawford* did not explicitly overrule *Craig*. *See* Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 Crim. Just. 4, 8 (2004) (arguing that "the rule of *Maryland* v. *Craig* is presumably preserved" following *Crawford*) (internal citation omitted). Accordingly, courts continue to apply the *Craig* rule. *See, e.g.*, *United States* v. *Yates*, 438 F.3d 1307, 1314 (11th Cir. 2006) (testimony that is not face-to-face may be offered in cases "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.'" (quoting *Craig*, 497 U.S. at 850)).

AMICUS CURIAE BRIEF

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(4)

No. 07-343

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In the Supreme Court of the United States

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Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to Louisiana Supreme Court

BRIEF OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, LOUISIANA CHAPTER; THE LOUISIANA FOUNDATION AGAINST SEXUAL ASSAULT; THE TEXAS ASSOCIATION AGAINST SEXUAL ASSAULT; AND THE NATIONAL ALLIANCE TO END SEXUAL VIOLENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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B. Allowing Louisiana to execute child rapists will increase the incentives on child molesters to kill their victims. 12

C. The Louisiana statute would subject child victims to an increased number of trials and appeals, forcing them to relive painful events repeatedly and disrupting the healing process. 14

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations of social workers and sexual assault crisis centers. They have substantial experience in treating child rape victims, helping their healing processes, and attempting to reduce the sexual exploitation of children. The *amici* thus have a strong interest in ensuring that sentencing schemes promote rather than hinder those goals.[1]

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world, with 145,000 members and 56 chapters. The NASW, Louisiana Chapter has 2,500 members. As part of its mission to improve the quality and effectiveness of social work practice—including with respect to the detection, treatment, and prevention of child sexual abuse—NASW promulgates professional standards and the *NASW Code of Ethics*, conducts research, provides continuing education, and advocates for sound public policies (including by filing *amicus* briefs in appropriate cases, before this Court and other courts).

The Louisiana Foundation Against Sexual Assault (LAFASA) is a private nonprofit organization composed principally of Louisiana's sexual assault

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[1] Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of this Court. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

crisis centers. LAFASA provides a voice for victims of sexual assault; its activities include consulting with law enforcement, social workers, nurses, schools, and employers on sexual assault prevention, intervention, and investigation; coordinating the peer monitoring of its members' crisis centers; educating the public on sexual assault issues; and collaborating with state agencies and crime victims' groups on developing state and federal policies on sexual violence.

The Texas Association Against Sexual Assault (TAASA) is a private nonprofit organization of over 80 crisis centers in Texas. TAASA works to end sexual violence and to assist victims in obtaining healing and justice through community education, youth outreach, law enforcement training, and public policy advocacy. Because of the recent passage of a Texas statute that is similar to the Louisiana statute at issue here (The Jessica Lunsford Act, 2007 TEX. GEN. LAWS ch. 593), TAASA has a particular interest in the outcome of this case.

The National Alliance to End Sexual Violence (NAESV) is a private nonprofit organization that advocates on behalf of the victims of sexual violence in support of efforts to create and improve services for victims and to combat sexual violence. The NAESV Board of Directors consists of leaders of state sexual assault coalitions and national law, policy, and tribal experts who promote the NAESV's mission.

The *amici* have particular insight into the degree to which child rape is a terrible crime that greatly harms its victims. Accordingly, ending the scourge of sexual violence against children and aiding its victims are among the primary missions of the *amici*. The *amici* believe that certiorari is warranted in this case because Louisiana's aggravated rape law, La.

Rev. Stat. § 14:42 undermines that quest. That statute provides that any act of oral-genital contact or anal or vaginal penetration of a child under the age of 13 years is a capital offense. *Id.* §§ 14:41–14:42. By permitting the execution of perpetrators of child sexual abuse, the statute will likely have exactly the wrong effect: rather than protecting children, this statute will increase the number of victimized children, encourage offenders to kill their victims, and interfere with victims' healing process.

SUMMARY OF ARGUMENT

This Court has held that the death penalty for the offense of raping a 16-year-old woman violates the Eighth Amendment's prohibition of cruel and unusual punishment because such a penalty "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977). Louisiana's capital aggravated rape statute is, if anything, even worse than the statute at issue in *Coker* because the imposition of the death penalty for child rape in fact *harms* the very children whom it is intended to help. The Court therefore should intervene now to invalidate the Louisiana statute in order to prevent these harms from continuing.

A. Executing child rapists will likely worsen the problem of underreporting that already frustrates efforts to combat child sexual offenses. The overwhelming majority of sexual abuse is committed by family members or close family friends. These relationships lead many victims—as well as family members who witness or suspect the abuse—to remain silent rather than to report the crime. For example, victims and other family members may fear the conse-

quences of the abuser's prosecution and incarceration. Louisiana's capital rape statute dramatically aggravates this problem. By magnifying the possible effects of a report of child rape, the Louisiana statute will likely ensure that fewer victims are identified and receive treatment—and that fewer abusers are stopped from continuing to abuse their victims and from victimizing even more children.

The increasing failure of the system to identify victims will produce a variety of harms for decades to come. Some harm will be immediate, in the form of continued abuse, while others will take years to manifest. Beyond the rise in the number of victims per offender, many former abuse victims may face a host of long-term mental-health and substance-abuse problems.

B. Because Louisiana's penalty scheme does away with the marginal deterrence that is a central feature of punishment theory, the scheme will also encourage abusers to *kill* their victims. Under Louisiana law, abusers face no greater penalty for raping and killing their victims than for merely raping them; thus, it is more likely that an abuser will choose to eliminate the victim, who is in many instances the sole witness to the crime.

C. Even were Louisiana's penalty scheme to function as the legislature presumably hoped—*i.e.*, with abusers brought to trial and child victims testifying against them—Louisiana's law would magnify the trauma that child victims experience in the criminal justice process. Even ordinary trials are highly traumatic for child victims. Death penalty trials, with their vastly increased publicity, expansive hearings, and multiplying pre-trial and post-conviction proceedings, will intensify that trauma by

increasing the scope and duration of the child victim's participation in the criminal justice system. Not only is increased exposure to trials known to hinder child victims' healing process, but the imposition of a death sentence will add to the guilt child victims sometimes feel and may preclude the possibility of a future therapeutic meeting between the victim and his or her abuser.

ARGUMENT

The Court Should Intervene Now To Eliminate The Death Penalty For Child Rape, A Penalty That Harms Abused Children Rather Than Helps Them.

In *Coker* v. *Georgia*, *supra*, this Court held that the Eighth Amendment to the United States Constitution forbids a state from executing the rapist of a 16-year-old woman because the penalty "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." 433 U.S. at 592. Louisiana's capital aggravated rape statute is similarly wanton. First, imposing the death penalty for child rape will reduce the likelihood that abuse will be reported and stopped, thus increasing the amount of abuse the victim suffers as well as the number of children who each abuser can victimize. Second, by equalizing the penalties for child rape and murder, Louisiana's statute encourages abusers to kill their victims. Finally, when a case does go to trial under Louisiana's law, the trauma caused by the extensive trial process itself and the prolonged notoriety the case will generate will be even more severe and long-lasting. Certiorari is therefore warranted so that this Court may reaffirm *Coker* and clarify that the Eighth Amendment

precludes imposition of the death penalty for rape of any form, regardless of the victim's age.

A. Permitting the death penalty for child rape will worsen the problem of under-reporting sexual abuse.

1. Child sexual abuse is disturbingly frequent. Estimates on the reported number of yearly victims range from about 83,000 to 217,000 children.[2] The actual number of victims is almost certainly much higher than even these numbers would suggest. In one of the most frequently cited articles on the prevalence of child sexual abuse, the author evaluated data from multiple retrospective surveys of adults and concluded that "there is considerable accumulated evidence that at least 20% of American women and 5% to 10% of American men experienced some form of abuse as children." David Finkelhor, *Current Information on the Scope and Nature of Sexual Abuse*, 4 THE FUTURE OF CHILDREN 31, 42 (Summer/Fall 1994).[3] This suggests that a relatively con-

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[2] See, *e.g.*, U.S. Department of Health and Human Services, *Child Maltreatment 2005* 41 tbl. 3-6 (2007) (estimating 83,810 reported incidents in 2005 by aggregating data from Child Protective Services reports); Andrea J. Sedlak & Diane D. Broadhurst, *Third National Incidence Study of Child Abuse and Neglect* 2-1 through 2-3, 3-3 tbl. 3-1 (1996) (estimating 217,700 victims in 1993 by canvassing more types of law enforcement agencies as well as reports from schools, day care centers, and mental health agencies).

[3] The number of male children who have been sexually abused may be even higher than this study suggests because males may be "more reluctant to disclose abuse than girls" even years later. Tina B. Goodman-Brown *et al.*, *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse*, 27 CHILD ABUSE & NEGLECT 525, 527 (2003) (reviewing the literature and noting

servative estimate would be that 500,000 children are sexually abused in America each year. See *id.* at 34.

The overwhelming majority of these victims were abused by family members or others close to the family. Nearly 70 percent were abused by parental figures, family members, daycare providers, or a friend or neighbor. See U.S. Department of Health & Human Services, *supra*, at 59 tbl. 3-17. In one study of rapes of girls under the age of twelve, 96 percent of the victims reported that they knew the rapist.[4]

2. Researchers have shown that most victims "do not disclose their abuse to anyone." Gail E. Wyatt *et al.*, *The Prevalence and Circumstances of Child Sexual Abuse: Changes Across a Decade*, 23 CHILD ABUSE & NEGLECT 45, 46 (1996) (collecting studies).[5]

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that, in retrospective studies of child sexual abuse victims, men were less likely to have disclosed their abuse during childhood).

[4] See Patrick A. Langan & Caroline Wolf Harlow, U.S. Department of Justice, *Child Rape Victims, 1992* 2 (June 1994) (estimating that about 17,000 girls under age twelve were raped in 1992, with the father being the offender one-fifth of the time).

[5] See also Rochelle F. Hanson *et al.*, *Factors Related to the Reporting of Childhood Rape*, 23 CHILD ABUSE & NEGLECT 559, 564 (1999) (reporting that 82.9 percent of female rape victims under the age of 18 did not report the abuse to the authorities); Daniel W. Smith *et al.*, *Delay in Disclosure of Childhood Rape: Results From a National Survey*, 24 CHILD ABUSE & NEGLECT 273, 278 (2000) (reporting that 9 percent of surveyed women had been raped as a child and that 28 percent of those victims had never previously disclosed the abuse to anyone); Kamala London *et al.*, *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 PSYCHOL. PUB. POL'Y & L. 194, 201 (2005) (reporting that ten out of eleven retrospective studies "indicated that only one third of

The reluctance to report sexual abuse is particularly high for abuse by family members.[6]

Victims are inhibited from coming forward out of shame, fear of being punished, and fear that the abuser will retaliate against the victim or other family members.[7] Victims also remain silent because they fear the consequences for the *abuser*, either out of confused loyalty or love or because the abuser has explained that "the family would become destitute should others learn of their behavior [and the abuser be arrested]." Gene G. Abel *et al.*, *Complications,*

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adults who suffered [child sexual abuse] revealed the abuse to anyone during childhood").

[6] See, *e.g.*, Tina B. Goodman-Brown *et al.*, *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse*, 27 CHILD ABUSE & NEGLECT 525, 537 (2003) (reporting that "[c]hildren whose abuse was intrafamilial took longer to disclose their abuse than did children whose abuse was extrafamilial"); Smith, 24 CHILD ABUSE & NEGLECT at 279, 283 (finding that only 12 percent of child rape victims reported their assaults to authorities and that delayed disclosure was associated with a familial relationship); see also *id.* at 284–85 (reporting that "[r]apes perpetrated by strangers were much more likely to be disclosed to someone within 1 month than rapes by either family members or non-family acquaintances" and that "rape by a stranger was the best individual predictor of whether a child would tell someone else about her rape relatively quickly").

[7] See, *e.g.*, SETH L. GOLDSTEIN, THE SEXUAL EXPLOITATION OF CHILDREN: A PRACTICAL GUIDE TO ASSESSMENT, INVESTIGATION, AND INTERVENTION 54–67 (2d ed. 1999); Wyatt *et al.*, 23 CHILD ABUSE & NEGLECT at 46 (collecting studies and noting that some victims do not disclose abuse "due to perceptions that the reporting process will * * * hurt other people important to the survivor"); Goodman-Brown, 27 CHILD ABUSE & NEGLECT at 537 (noting the desire to protect family members other than the abuser and citing fears about how non-offending parents will react, as well as a sense of responsibility for the abuse.).

Consent, and Cognitions in Sex Between Children and Adults, 7 INT'L J. L. & PSYCHIATRY 89, 99 (1984).[8]

Other relatives may also be reluctant to disclose abuse for related reasons: because of their positive feelings for the abuser or because they fear the collateral consequences to themselves or the family if they disclose the abuse.[9] Indeed, as states have enacting statutes mandating that health professionals report child abuse, the actual number of reports has *declined*, apparently because families decide not to go to professionals when they know that doing so will mean that the abuse will be reported to authorities.[10]

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[8] See also JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 18 (2005) (listing fear of harm to the abuser as among the "cogent reasons" for not reporting); Goodman-Brown, 27 CHILD ABUSE & NEGLECT at 528 ("Fear of negative consequences of disclosure may be particularly salient in cases of incest because children may fear their parent will be punished.") (citations omitted); Smith, 24 CHILD ABUSE & NEGLECT at 274 ("[I]n cases of intrafamilial abuse victims often experience significant emotional conflict about making disclosures that implicate caretakers or other loved ones * * *.") (citation omitted).

[9] See STEPHEN T. HOLMES & RONALD M. HOLMES, SEX CRIMES 86 (2d ed. 2002) (noting that a dependent spouse may not report abuse because of the stigma and economic consequences of her partner being incarcerated); DOUGLAS J. BESHAROV, RECOGNIZING CHILD ABUSE 94 (1990) ("Conscious denial [of abuse] is often related to a parent's fear of family disintegration, legal consequences or the reaction of the other spouse."); Abel *et al.*, 7 INT'L J. L. & PSYCHIATRY at 99 (noting that some feared repercussions may actually occur).

[10] F.S. Berlin *et al.*, *Effects of Statutes Requiring Psychiatrists to Report Suspected Sexual Abuse of Children*, 148 AM. J. PSYCHIATRY 449 (1991).

3. The threat of capital punishment for child sexual abusers greatly amplifies the concerns that already prevent many victims and relatives from reporting abuse. Victims who love their abusers may be all the more reluctant to report abuse to police when the possible consequences include lethal injection.[11] The reluctance may also be a product of the victim's own sense of responsibility for the abuse.[12]

Likewise, a non-offending family member, already facing "a difficult decision to make," HOLMES & HOLMES, *supra*, at 86, will face an even harder choice. Instead of encouraging the best positioned witnesses—the victim and other family members—to report abuse, Louisiana's law will reinforce the internal constraints that victims and their family members may already feel.

4. Fewer reports by victims and family members will cause the victims to endure continued abuse that otherwise would have been averted, with increasingly severe consequences.[13] The wounds caused by child abuse are deep, but treatment, if obtained, can

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[11] *Cf.* ANNA C. SALTER, TREATING CHILD SEX OFFENDERS AND VICTIMS: A PRACTICAL GUIDE 216 (1988) (noting, in the context of treating victims, that "[p]articularly in incest cases, where the child may be very attached to the father, fear of loss may take precedence over the anger.").

[12] See Goodman-Brown, 27 CHILD ABUSE & NEGLECT at 528 (noting that many sexually abused children "come to believe that they are at least partially responsible for their own abuse").

[13] See GOLDSTEIN, *supra*, at 70; Abel *et al.*, 7 INT'L J. L. & PSYCHIATRY at 91.

help the healing process.[14] By contrast, the treatment prognosis for children who suffer from *prolonged* sexual abuse is much more bleak; for example, such abuse increases the likelihood that the victim will subsequently engage in crime, become pregnant while a minor, drop out of school, abuse alcohol or drugs, and suffer from psychological disorders, such as depression, anxiety disorders, and posttraumatic stress disorder.[15]

But the damage caused by Louisiana's statute will not be limited to predators' current victims. "Sex offenders who are not arrested, convicted, and sent to prison remain free to commit more sex crimes." LA FOND, *supra*, at 32; see also HOLMES & HOLMES, *supra*, at 89. Rates of recidivism are lower than popular perception would have it, but they are still significant: one study found that 10 percent of child molesters offend again within 4 to 5 years; other studies

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[14] See SALTER, *supra*, at 248 ("In cases in which there is no intervention, the powerlessness of the victim often continues even after the abuse itself has stopped.").

[15] See Barbara Tatem Kelly, U.S. Department of Justice, *In the Wake of Childhood Maltreatment* 2 (Aug. 1997); PAULA K. LUNDBERG-LOVE, THE RESILIENCE OF THE HUMAN PSYCHE: RECOGNITION AND TREATMENT OF THE ADULT SURVIVOR OF INCEST, IN THE PSYCHOLOGY OF SEXUAL VICTIMIZATION: A HANDBOOK 5–8 (Michele Antoinette Paludi ed., 1999). See also Jill Goldman *et al.*, U.S. Department of Health and Human Services, *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice* 36 (2003) (in reaction to "persistent stress associated with ongoing maltreatment, the child's brain may strengthen the pathways among neurons that are involved in the fear response. As a result, the brain may become 'wired' to experience the world as be hostile and uncaring.").

have found that recidivism rates grow higher when the time span is extended.[16]

5. Nor will these effects remain confined to Louisiana's borders. Laypersons, who may not comprehend the finer points of our federal system, would view the doubtless-well-publicized execution of Patrick Kennedy as a signal that any state (perhaps their own) can impose the same penalties for the same conduct. Moreover, offenders in Louisiana who will go undetected may commit offenses in other states. Finally, the increasing number of victims mean that more former abuse victims will ultimately leave the state, emigrating with the burdens that Louisiana's law makes worse.

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Accordingly, the Court should intervene now to strike down Louisiana's capital punishment scheme, which will otherwise worsen the underreporting problem, causing ripple effects that will linger for decades.

B. Allowing Louisiana to execute child rapists will increase the incentives on child molesters to kill their victims.

By tying the level of punishment to the severity of the crime, criminal law seeks to reduce the severity of criminal activity.[17] Imposing the death penalty

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[16] See R. Karl Hanson, *Who is Dangerous and When are they Safe? Risk Assessment with Sexual Offenders*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 64–65 (Bruce J. Winick and John Q. La Fond eds., 2003).

[17] See, *e.g.*, *United States* v. *Beier*, 490 F.3d 572, 575 (7th Cir. 2007) ("[T]he concept of marginal deterrence * * * is that punishing two crimes of different gravity the same is unsound

for child rape upsets this basic tenet of penalty schemes—marginal deterrence—with potentially devastating effects nationwide.

If the death penalty is reserved for murder, then sex offenders have an incentive to stop short of killing their victims. Louisiana's statute, by imposing the death penalty for child rape, dangerously realigns sex offenders' incentives. If an offender believes that he will be sentenced to death if convicted of either raping a child or murdering that child, the offender will have every incentive to kill his victim and thus eliminate the primary witness to the crime.[18] The offender will as a result also be more likely to remain free to abuse additional children, in Louisiana and elsewhere.[19]

Moreover, abusers who are not known by their victims will have the strongest incentive to kill. Studies show that these abusers are already the most likely to kill their victims.[20] Because these

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when to do so would encourage additional crimes."); see also STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 518–19 (2004); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 178 (1789); CESARE BECCARIA, ON CRIMES AND PUNISHMENTS, AND OTHER WRITINGS 21 (Richard Bellamy ed., 1995) (1767).

[18] See, *e.g.*, Corey Rayburn, *Better Dead Than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1159 (2004) ("If murder does not incur additional punishment, then the motivation to kill the primary witness to the crime is strong.").

[19] Indeed, even child molesters in states that do not impose the death penalty may decide to kill their victims in response to news reports about Louisiana's punishment scheme.

[20] See Lawrence A. Greenfeld, U.S. Department of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* 30 (Feb. 1997) (re-

cases are the ones in which child victims are most likely to report the abuse, the Louisiana law eliminates the increase in penalty that may have dissuaded some stranger perpetrators from killing—and thus silencing—their victims. Thus, not only does the Louisiana statute inhibit reporting in the majority of child sexual assaults, which are committed by family members or acquaintances, see Part A, *supra*; the scheme also encourages stranger perpetrators to kill their victims. The perverse consequence of this is to reduce the likelihood that the offender will be apprehended and that the victim will survive and receive treatment.

C. The Louisiana statute would subject child victims to an increased number of trials and appeals, forcing them to relive painful events repeatedly and disrupting the healing process.

It is well established that sexually abused children find the criminal justice process to be highly traumatic. Louisiana's statute will greatly increase the extent of this trauma.

1. As a general matter, court proceedings increase and extend the harm to children that began with the abuse:

> In the midst of * * * vulnerability [following disclosure of abuse], the criminal justice, health, and social service systems may descend upon a child and family with such a devastating impact that its recipients are

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porting that "[s]exual assault murders were about twice as likely as all murders * * * to involve victims and offenders who were strangers").

> left with the feeling that the "cure" is far worse than the symptoms.

Kee MacFarlane, *Sexual Abuse of Children*, *in* THE VICTIMIZATION OF WOMEN 81, 97 (Jane Roberts Chapman & Margaret Gates eds., 1978). Indeed, some experts conclude that "children are often *more* traumatized by the court proceedings than by the sexual abuse." KAREN L. KINNEAR, CHILDHOOD SEXUAL ABUSE 26 (2d ed. 2007) (emphasis added).[21]

Perhaps the most comprehensive study to have examined the effects of testifying on abused children was conducted by Gail S. Goodman. She found that child victims find testifying in criminal court to be traumatic, not cathartic. See GAIL S. GOODMAN ET AL., TESTIFYING IN CRIMINAL COURT 50 (1992).[22] Moreover, repeated courtroom testimony especially hinders healing. See *id.* at 51.

Goodman and other researchers recently updated her original study and interviewed about 80 percent of that study's participants. They found that, ten years later, having testified repeatedly was "associated with poorer later mental health, including more trauma-related symptoms" and that these negative effects appeared even "for individuals who had im-

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[21] See also Roger J.R. Levesque, *Prosecuting Sex Crimes Against Children: Time for "Outrageous" Proposals?*, 19 L. & PSYCHOL. REV. 59, 82 (1995) ("The best data shows that the likelihood that intervention, under the current system, may fail or even harm the child victim is greater than we wish to acknowledge.").

[22] This Court cited an earlier version of this study in *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (noting the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court").

proved in the short term." JODI A. QUAS ET AL., CHILDHOOD SEXUAL ASSAULT VICTIMS: LONG-TERM OUTCOMES AFTER TESTIFYING IN CRIMINAL COURT 72 (2005). The authors concluded that "testifying in the adversarial system appears to be a salient feature in and of itself with direct implications for negative outcomes, including years after legal cases have ended." *Ibid.*

2. These findings strongly suggest that Louisiana's penalty scheme will impede victims' healing process. The unique nature of the penalty here—the death penalty—will magnify the traumatic nature of the judicial process.

First, the introduction of the death penalty will likely increase the extent of the victim's exposure to the trial process. Capital cases tend to feature more and lengthier pretrial proceedings than noncapital cases. In fact, a recent study found that capital rape cases in Louisiana averaged 633 days from arrest to disposition, whereas noncapital rape cases averaged less than half as long—283 days.[23] The death penalty process itself also necessitates bifurcated trials, see *Gregg* v. *Georgia*, 428 U.S. 153, 195 (1976), at each stage of which the victim may be called to testify.

In addition to producing more court proceedings requiring the victim's attendance or participation, the intensity of that participation is also likely to increase. Child abuse victims are more likely to be required to testify in person in a death penalty case because the protections that child abuse victims have traditionally enjoyed in court may be eroded as "the

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[23] See Angela D. West, *Death as Deterrent or Prosecutorial Tool? Examining the Impact of Louisiana's Child Rape Law*, 13 CRIM. JUST. POL'Y REV. 156, 183 (2002).

acute need for reliable decisionmaking when the death penalty is at issue" (*Deck* v. *Missouri*, 544 U.S. 622, 632 (2005) (internal quotation marks omitted)) tilts the constitutional balance in favor of an abuser's "right to face his or her accusers in court" and against the "State's interest in the physical and psychological well-being of child abuse victims." *Craig*, 497 U.S. at 853; see also *ibid.* (noting that only "in some cases" would the State's interest in protecting the child witness "outweigh" the defendant's Confrontation Clause rights).

The fact that a capital case could result in the execution of the defendant also heightens the stakes for a testifying child victim, who in many cases may feel tremendous guilt and remain emotionally attached to the perpetrator. But one of the findings of the updated Goodman study is that the greater the distress of the victim while testifying—recorded by researchers using measures such as how emotional the child was on the witness stand—the poorer his or her adjustment ten or more years later.[24]

Thus, one therapist recounts her first-hand observation of the effects of putting victims on the witness stand:

> [I] will never forget the look on the face of a 9-year-old incest victim when her father was brought into the courtroom with chains and handcuffs around his hands and waist. * * * Her only comment before she withdrew into a spasmodic, twitching epi-

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[24] See QUAS, *supra*, at 102 (concluding that "[f]eeling more negative about having to testify * * * was associated with higher levels of" multiple measures of adverse mental health.).

> sode * * * was, "I did *that* to my Daddy?"

MacFarlane, *Sexual Abuse of Children*, *supra*, at 99 (emphasis in original). Because testifying against a parent or other loved one with the knowledge that death may follow conviction will assuredly make the experience even more distressing for the child, victims are more likely to experience intense and lasting negative effects.[25] Indeed, the Louisiana Supreme Court noted that when the victim in this case was on the stand, she wept repeatedly and at length—including one interlude of at least 23 minutes. See Pet. App. 16a.

Moreover, the added publicity from a death penalty trial could alone be sufficient to increase the trauma experienced by a victim. The greater the public attention that is focused on the victim, the more traumatic the experience of testifying is likely to be. See *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 618 (1982) (Burger, C.J., dissenting) ("having to relate the details of the crime in front of a crowd which inevitably will include voyeuristic strangers," and which "may be expanded to include a live television audience, with reruns on the evening news," may be a "devastating" experience "leav[ing] permanent scars" for a child victim of a sex crime). More generally, when an instance of child sexual abuse gains notoriety, "negative consequences for the child are more likely to result." Abel, 7 INT'L J. L. & PSYCHIATRY at 93.

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[25] See QUAS, *supra*, at 102 (noting that a greater awareness of legal consequences "probably contribute[s]" to increased distress while testifying).

In addition, the extended appeals process that inevitably follows a death sentence will draw out the trauma and hinder the healing process. The original Goodman study found that "by the time the cases were resolved, the behavioral adjustment of most, but not all children who testified was similar to that of children who did not take the stand." GOODMAN, *supra*, at 114–15. While subsequent work reveals a more lasting impact, and the study did not and could not examine the effects of drawn out death penalty appeals, Louisiana's scheme will necessarily mean that cases are not "resolved" for years. As of 2005, the length of time between sentencing and execution averaged 12 years and three months. Tracy L. Snell, U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 2005*, at 11 tbl 11 (Dec. 2006). During this period, not only would the publicity accompanying each stage of the appellate process dredge up traumatic memories for the victims, the high reversal rate in capital cases[26] would subject many victims to one or more retrials at which they would again relive the abuse. This lack of closure—as well as the trauma of the eventual execution itself and the enormous publicity attendant to such an execution—could very well hamper the healing process. *Cf.* LA FOND, *supra*, at 25 (noting that triggering events may push "horrible memories of the crime" to the fore).

Finally, the fact that the abuser ultimately is executed precludes the option of future healing through a possible structured visit, which provides

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[26] See, *e.g.*, James S. Liebman *et al.*, *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000) (68 percent reversal rate).

the victim with the opportunity to confront his or her abuser. The Louisiana Department of Public Safety and Corrections maintains a Victim/Offender Dialogue program.[27] An executed offender could not participate in this process.

* * * * *

The consequences of the Louisiana statute authorizing the death penalty for child rape are perverse—almost certainly increasing the amount of child sexual abuse, placing the victims of child abuse at great risk of death, and increasing the trauma that such victims suffer. This Court should grant the petition for certiorari to protect the victims of child rape and to clarify that, despite the heinous nature of this crime, the Eighth Amendment forbids the execution of child rapists.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[27] See Louisiana Department of Public Safety and Corrections, Victims Services, *at* http://www.doc.louisiana.gov/Victim%20Services/victim_services.htm.

Respectfully submitted.

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NOVEMBER 2007

JOINT APPENDIX

FILED
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No. 07-343

IN THE
Supreme Court of the United States

PATRICK KENNEDY,
Petitioner,

v.

LOUISIANA,
Respondent.

On Writ of Certiorari
To The Louisiana Supreme Court

JOINT APPENDIX

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IN THE SUPREME COURT OF LOUISIANA

Case No. 2005-KA-1981

Patrick Kennedy,

APPELLANT,

v.

State of Louisiana,

APPELLEE.

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
12/09/2004	Motion for Appeal
12/21/2004	Order GRANTING Appeal
2/28/2007	Oral Argument
5/22/2007	Opinion Issued AFFIRMING
6/29/2007	Petition for Rehearing DENIED

IN THE TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

Case No. 98-1425

State of Louisiana,

v.

Patrick Kennedy,

DEFENDANT.

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
05/07/1998	Indictment
10/30/1998	Motion to Quash Indictment Filed
11/10/1998	Hearing on Motion to Quash Indictment
02/03/1999	Motion to Quash DENIED
08/08/2003	Jury Selection
08/15/2003	Trial Begins
08/25/2003	Guilty Verdict
08/26/2003	Penalty Phase Begins
08/26/2003	Penalty Phase Verdict
10/02/2003	Motion for New Trial, for Arrest of Judgment and/or for Other Relief – FILED
10/02/2003	Motion for New Trial, for Arrest of Judgment and/or for Other Relief – DENIED
10/02/2003	Formal Imposition of Sentence

Twenty-Fourth Judicial District Court of Louisiana

THE STATE OF LOUISIANA **Parish of Jefferson SS.**

Twenty-Fourth Judicial District **Twenty-Fourth Judicial District Court**

The Grand Jurors of the State of Louisiana, duly empaneled and sworn, in and for the body of the Parish of JEFFERSON, in the name and by the authority of the said State, upon their Oath, present: That one

PATRICK KENNEDY, b/m 12/13/64

late of the Parish of JEFFERSON, on or about the 2nd day of March in the year of our Lord, One Thousand Nine Hundred and Ninety-Eight (1998), with force and arms, in the Parish of JEFFERSON aforesaid, and within the jurisdiction of the Twenty-Fourth Judicial District Court of Louisiana, in and for the Parish of JEFFERSON aforesaid, then and their being violated R.S. 14:42 in that he did commit aggravated rape upon a female juvenile under the age of 12 years,

IMAGED
May 8 1998

contrary to the form of the Statute of the State of Louisiana, in such case made and provided, and against the peace and dignity of the State.

/s/_____
Asst. District Attorney of the Twenty-Fourth Judicial District

ITEM # C-1086-98
Class I

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 98-1425 DIVISION "0"

STATE OF LOUISIANA

VERSUS

PATRICK KENNEDY

FILED: 8/26/03 /s/_____
DEPUTY CLERK

Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of mitigating circumstances offered, the jury unanimously determines that the defendant Patrick O'Neal Kennedy should be sentenced to death.

Aggravating circumstance or circumstances found:

A. Aggravated Rape

B. Victim under the age of 12 years

Gretna, Louisiana, this 26 day of August, 2003.

/s/_____
FOREPERSON (signature)

Kevin G. Servat
FOREPERSON (print name)

[IMAGED AUG 27 '03]

1/c Image "Verdict-Penalty Phase"

In the Supreme Court of Louisiana

No. 05 KA 1981

State of Louisiana,

Plaintiff-Appellee

v.

Patrick Kennedy,

Defendant-Appellant.

Appeal from Conviction and Death Sentence Imposed
In the 24th Judicial District Court for the
Parish of Jefferson
Hon. Ross LaDart, Judge, Presiding.

THIS IS A DEATH PENALTY CASE

SENTENCE REVIEW MEMORANDUM

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In the Supreme Court of Louisiana

No. 05 KA 1981

State of Louisiana,

Plaintiff-Appellee

v.

Patrick Kennedy,

Defendant-Appellant.

Appeal from Conviction and Death Sentence Imposed
In the 24th Judicial District
Court for the Parish of Jefferson
Hon. Ross LaDart, Judge, Presiding.

SENTENCE REVIEW MEMORANDUM

COMES NOW APPELLANT, Patrick Kennedy, through counsel and pursuant to Rule 28 of the Rules of the Supreme Court of Louisiana, Article 905.9 of the Louisiana Code of Criminal Procedure, the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sections 13, 16, 19, 20, 21, 22, 23 and 24 of the Louisiana Constitution of 1974, who respectfully files this sentence review memorandum.

INTRODUCTION

Mr. Kennedy is on death row for a non-homicide offense. No person in the United States has been put to death for rape since Missouri executed Ronald Wolfe in

1964. The State of Louisiana has not executed a person for rape since 1957. Of the three thousand three hundred and sixty six (3,366) inmates who are presently on Death Row in the United States, Patrick Kennedy is the only one awaiting execution for a non-homicide rape.

John Michel, in 1957, was the last person put to death for rape in Louisiana. Mr. Michel was a twenty-three-year-old black male convicted of raping a white female. In the entire history of Louisiana, there have been five hundred and ninety nine (599) executions. Although only a small percentage of these executions in total were for non-homicide offenses, all of those executions occurred before our modern capital jurisprudence, and a significant number of them included the hangings of slaves.

Mr. Kennedy would be the first executed for rape since 1957, but would extend the long and lonely string of African-American men executed for rape. The death sentence imposed upon Mr. Kennedy is disproportionate and excessive, given the large number of instances in which defendants have received lesser punishments for greater, or equal offenses.

The State filed a Sentence Review Memorandum on April 21, 2006. The State's Sentence Review Memorandum first details the seventy-seven cases that are *mistakenly* claimed to be all of the "first degree murder indictments" in which sentence was imposed after January 1, 1976. Of those seventy-seven cases, three defendants were executed, and twelve defendants remain on death row with appeals or other challenges to their convictions and sentences pending. The State's Sentence Review Memorandum includes discussion of sixty-two defendants charged with first degree murder who have not been sentenced to death. A number of these defendants who were not sentenced to death committed offenses far worse than the offense committed in this case.[1] The State's Sentence Review Memorandum also

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[1] As discussed in more detail below, the State's Sentence Review Memorandum details a number of cases in which defendants received a life sentence for actions that were incontrovertibly worse than those

fails to detail a number of murders, including some of children, that are worse than the offense in this case.[2]

The State's Sentence Review Memorandum next details a list of capital aggravated rape cases in which sentence was imposed "after August 15, 1995." The Memorandum details twelve aggravated rape cases, and indicates that this is the only case in which a defendant has been sentenced to death. The State's Sentence Review Memorandum does not detail other comparable cases throughout the State of Louisiana that resulted in a sentence less than death. *See e.g. State v. Clark*, 2002-1463 (La. 06/27/03); 851 So. 2d 1055, 1089 ("Given the lack of comparable cases in Richland Parish, it is appropriate for this court to look beyond the judicial district in which the sentence was imposed and to conduct the proportionality review on a state-wide basis.") *citing, inter alia*, *State v. Carmouche*, 2001-0405 (La. 05/14/02); 872 So. 2d 1020; *State v. Deal*, 00-0434, p. 17 (La. 11/28/01), 802 So. 2d 1254, 1268; *State v. Duncan*, 99-2615, p. 38 (La. 10/16/01), 802 So. 2d 533, 559; *State v. Howard*, 98-0064, (La.4/23/99), 751 So. 2d 783, 820; *State v. Ortiz*, 96-1609, (La.10/21/97), 701 So. 2d 922, 936. Nor does the State address the particular mitigating circumstances at issue in this case that render the imposition of the death penalty excessive, arbitrary, wanton, and freakish.

Appellant counsel's effort to provide such a review ensues.

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presented to the jury in this case. For instance, the State's Memorandum details the case of Brian Bibb who was sentenced to life for stabbing to death two children ages 5 and 3, and attempting to kill the children's mother.

[2] As discussed below the State's Sentence Review Memorandum does not detail a number of cases involving charges of first degree murder, including – for instance – the case of Whitney Spencer, who was charged with four counts of first degree murder for intentionally killing 14-month-old Keitwon Ester, six-year old Ranneisha Kent, seven-year old Deaunta Kent, and four-year old Branika Murph. See State v. Spencer, 00-2084, Division A, 24th JDC, Jefferson Parish.

ARGUMENT

In addition to the arguments put forth in Mr. Kennedy's Original and Supplemental Briefs, the sentence of death imposed in this case is disproportionate and excessive given the vast number of instances in which a lesser sentence has been imposed for equal or greater offense. Moreover, the existence of critical mitigating circumstances renders the imposition of the death penalty in this case arbitrary.

Mr. Kennedy is the only person to be sentenced to death in the United States for rape in over forty years, and the only person to be sentenced to death for rape in Louisiana in over fifty years. Louisiana juries' recalcitrance to sentence aggravated rapists to death, and the fact that every other convicted aggravated rapist in Louisiana is serving life or less – independently and together – make clear the excessive and disproportionate nature of the sentence.

As discussed more fully below, in the vast majority of prosecutions for capital rape, the charges are usually dropped to lesser charges, or the case proceeds without the possibility of capital punishment.[3] When the cases proceed to a jury, juries in Louisiana routinely return life sentences to those defendants who are convicted of aggravated rape of a child under twelve.

Moreover, the death penalty is an unusual punishment for defendants convicted even of killing children, and a significant number of defendants have received lesser sentences for the offense of intentionally murdering a child during the course of a rape.

Undersigned counsel has attempted to secure information concerning comparable cases from a variety of sources to establish that the death sentence in this case is disproportionate. Counsel sent public records requests to

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[3] See Angela D. West, *Death as Deterrent of Prosecutorial Tool? Examining the Impact of Louisiana's Child Rape Law*, 13 Crim. Just. Pol. Rev. 156 (2002).

Clerk of Court in every parish in Louisiana. *See Exhibit A.* Thirty-four (34) parishes - including Orleans[4] - did not respond to those requests. Eleven (11) responded to that request indicating that they could not provide the information. *See Exhibit B.* Nine (9) responded that no capital rapes prosecutions had occurred in their districts.[5] *See Exhibit C.* One (1) other parish responded that it was unable to segregate capital rape from other non-capital aggravated rape, but provided information concerning these offenses. *See Exhibit D.* Finally, a mere nine (9) parishes provided information responsive to the request. *See Exhibit E.* This information led to the disclosure of eighty-eight (88) additional cases involving indictments for aggravated rape.

After securing the information discussed above, counsel also sought to review all of the published and unpublished appeals involving the charge of aggravated rape of a child. These additional cases are discussed below. Appellant counsel also reviewed the information concerning one hundred additional cases that were introduced as Exhibit B at the Motion for New Trial. See R. 6053.[6] At that

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[4] Angela West, in assessing the different charging practices prior to the amendment to the aggravated rape statute reviewed the case-files for thirty-two indictments for aggravated rape that occurred in Orleans between 1995 and 1998, roughly ten a year. See Angela D. West, *Death as Deterrent of Prosecutorial Tool? Examining the Impact of Louisiana's Child Rape Law*, 13 Crim. Just. Pol. Rev. 156, at 160 (2002). Undersigned counsel has not been able to review the case-files on these cases or the ones that have occurred since. It would be sufficiently conservative to approximate that there have been at least an additional one hundred and ten (110) such indictments in Orleans alone since 1995.

[5] This information received from the districts is not necessarily deemed accurate. Indeed, Jerry Jones of the 4th Judicial District indicated that no such capital rape indictments had issued in his jurisdiction, even though the case of *State v. Bethley* arose from that district. See *State v. Wilson*, 685 So.2d 1063, 1073 (La. 1996).

[6] Where counsel has secured a citation to a court record for any of the cases identified in MNT Exhibit B, counsel has referred to the case

proceeding, the State stipulated to the authenticity and accuracy of the research prepared by researcher Emily Maw, who had endeavored to identify every single pending capital rape indictment within four different parishes.

Finally, undersigned counsel attempted to review news media and other public reports concerning charges of aggravated rape of a child. Substantiation of the data discussed below is attached to this Brief in Reply to the State's Sentence Review Memorandum. Undersigned counsel wholeheartedly concurs that the documentation and citation identified herein does not establish the entire universe of capital rape charges but notes that it vastly expands the universe of eleven (11) cases provided by the state to a total of more than one hundred and eighty (180) cases.

I. THE SENTENCE OF DEATH IMPOSED ON MR. KENNEDY IS EXCESSIVE AND DISPROPORTIONATE WHEN COMPARED TO SIMILAR OR WORSE OFFENSES.

The sentence of death imposed on Mr. Kennedy is excessive and disproportionate when compared to the sentence imposed in similar or worse offenses. The State lists twelve (12) defendants in its Sentence Review Memorandum who were convicted since the aggravated rape statute's enactment; from these twelve cases, only the Appellant in this case has been sentenced to death.

To the extent that the State's Sentence Review Memorandum does not have sufficient data to demonstrate the disproportionality of the sentence in this case, "it is appropriate for this court to look beyond the judicial district in which the sentence was imposed and to conduct the proportionality review on a state-wide basis." *State v. Clark*, 2002-1463 (La. 06/27/03); 851 So. 2d 1055, 1089.

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citation. Where undersigned counsel could find no record citation, counsel has cited to Exhibit B, MNT (10/2/2003).

As discussed more fully below, over one hundred and eighty (180) defendants have been charged with capital rape since 1995. Mr. Kennedy is the only person sentenced to death. Moreover, over forty (40) defendants have been sentenced to a lesser penalty for a greater offense.

Assuming, arguendo, the constitutionality of the death penalty for aggravated rape, a comparison of this case and other instances in which death was not imposed suggests that the imposition of the death penalty is being applied in an unconstitutional manner. See State v. Sonnier, 380 So. 2d 1 (La. 1979). In Sonnier, this Court observed:

> . . . A review of [. . .] other prosecutions shows that the jury's recommendation of the death penalty in the instant case does not conform with sentences meted out in other [. . .] cases. . . . Imposition of the death penalty in this case but not in the other cases suggests that the penalty is being applied in the "freakish" and "wanton" manner reprobated by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Therefore, under this test, the penalty is excessive within the meaning of Article 905.9 of the Code of Criminal Procedure.

State v. Sonnier, 380 So. 2d 1, 7-8 (La. 1979). A review of other cases located by appellant counsel is warranted.

A. Since The Adoption Of The Statute, Defendants Have Not Received The Death Penalty In All of the One Hundred And Eighty (180) Comparable Cases Identified By Appellant.

Appellant counsel has attempted to identify all of the comparable cases. In the one hundred eighty (180) comparable cases identified by appellant counsel, no other defendant has been sentenced to death.

1. Daniel E. Dickerson was convicted of raping his four year-old granddaughter anally and vaginally. Though the state sought death, the jury in his case found life

imprisonment to be the more appropriate sentence. *State v. Dickerson*, 01-KA-1287 (La App. 5 Cir. 6/26/02) 822 So.2d 849; *writ denied* 02-K-2108 (La. 2/21/03) 837 So.2d 627.

2. Fred J. Leblanc was convicted of repeatedly raping (vaginally, anally and orally) the four-year-old child he was babysitting. He also made the child perform oral sex on him while watching pornographic films with him. Despite the extensive nature of the rapes, the jury declined to sentence Fred Leblanc to death and imposed life without parole. *State v. Leblanc*, 00-1322 (La. App. 5 Cir. 5/31/01) 788 So.2d 1255; *writ denied* 01-K-1920 (La. 5/24/02) 816 So.2d 299.

3. Keith Bell Breland was convicted of raping and attempting to kill his fellow church congregant's eleven-year-old daughter. As she screamed during the rape he stabbed her multiple times. He also tried to smother the child by putting his hand over her nose and mouth causing the child to lose consciousness. When the girl regained consciousness, Mr. Breland slashed her throat. Despite sustaining life-threatening injuries, the little girl survived. Keith Bell Breland was sentenced to fifty (50) years for attempted murder and twenty-five (25) for rape. *State v. Breland*, 722 So.2d 51 (La. App. 1 Cir. 1998).

4. Bryan Cole was convicted of raping a five-year-old girl. Before sexual intercourse, he made the little girl masturbate him. The victim was diagnosed with gonorrhea when examined after the rape. Mr. Cole's older daughter and her eleven year-old friend witnessed the rape. His daughter's friend was also anally raped by Mr. Cole on another occasion when she was spending the night with his daughters. Bryan Cole was given a life sentence on November 14, 2003. *State v. State ex rel. Bryan Cole*, 05-1348 (La. 2/10/06), 924 So.2d 157.

5. Tracy Albert was found guilty of impregnating his ten year-old step-daughter. Soon after the pregnancy was discovered, the little girl was forced to undergo an abortion. The jury sentenced Albert to life without parole on

9/8/2004. *State v. Albert*, (La.App. 4 Cir. 7/27/05) 914 So.2d 574.

6. Patrick Dewayne Bethley was convicted of repeatedly raping three girls, one of whom was his daughter. The ages of the little girls at the time of the rape were five, seven, and nine. Mr. Bethley knew he was HIV positive when he committed the rapes. He received a life sentence. Cf *State v. Bethley*, No. 96-KA-1392 consol. with No. 96-KA-2076, 96-1392 (La. 12/13/96); 685 So. 2d 1063; *State v. Wilson*, 685 So.2d 1063, 1073 (La. 1996); *see also* Rhonda Bell, *Rape Suspect OT Ready for Trial Mentally Retarded Man Faces Death if Convicted of Rape of Six-Year-Old*, NEW ORLEANS TIMES PICAYUNE, December 16, 1999, Section: Metro.

7. Michael Chad Lowe was found guilty of repeatedly raping (orally) his stepdaughter from the time the she was eight until she was ten. He was sentenced to twenty-five (25) years imprisonment, two of which without benefits. *State v. Lowe*, 39,181 (La. App. 2 Cir. 12/22/04), 890 So.2d 745.

8. Robert Bourgeois was found guilty of raping his great-granddaughter from the time she was nine until she turned twelve. He performed oral sex on the child and made the victim perform oral sex on him. Robert Bourgeois received a life sentence on November 20, 1999. *State v. Bourgeois*, 00-KA-1353 (La. App. 5 Cir. 4/11/01) 786 So.2d 771.

9. Jimmy J. Bergeron was found guilty of raping his eleven-year-old daughter and sentenced to life imprisonment. *State v. Bergeron*, 01- 2400 (La. App. 1 Cir. 5/10/02), 826 So.2d 658, *writ denied* 2002-KA-1735 (La. 5/30/03), 845 So.2d 1070.

10. Jerry Zornes was convicted of raping his six-year-old step-daughter and was sentenced to life imprisonment. *State v. Zornes*, 34,070 (La. App. 2 Cir. 4/3/02), 814 So.2d 113, *writ denied* 02- 1280 (La. 11/27/02), 831 So.2d 269.

11. Isaac Singleton, III was convicted of raping his eleven-year-old niece on March 3, 2001. Isaac Singleton was sentenced to life imprisonment. *State v. Singleton*, 05-KA-622 (La. App. 5 Cir. 1/31/06), 922 So.2d 647.

12. Donald Sims was found guilty of raping a seven-year-old girl. The victim was diagnosed first with vaginitis and vaginal pin worms, gonorrhea and chlamydia in her vagina and in her anus from the rape. Donald Sims received a life sentence on September 9, 1999. *State v. Sims*, 00-KA-1728 (La. App. 5 Cir. 5/30/01), 796 So.2d 941.

13. Donald Washington was convicted of raping his girlfriend's seven-year-old daughter multiple times. Mr. Washington also raped the victim's fourteen-year-old sister and another fourteen-year-old while armed with a deadly weapon. He was sentenced to ten (10) years imprisonment for sexual battery and forty (40) years imprisonment for each forcible rape conviction. There were two in all. *State v. Washington*, 99-KA-1330 c/w 99-KA-1331 (La. App. 5 Cir. 5/17/00), 793 So.2d 574, *writ denied* 00-KO-1943 (La. 9/21/00), 797 So.2d 59.

14. David Earl Roberts was convicted of raping a seven-year-old girl. He received a sentence of life imprisonment. *State v. Roberts*, 33,814 KA (La. App. 2 Cir. 9/27/00), 769 So.2d 162, *writ denied*, 2000-3027 (La. 10/26/01) 799 So.2d 1149.

15. John Clyde Allen, Jr. was found guilty of raping an eleven-year-old girl three times in one night. Mr. Allen woke the victim up in the middle of the night and took her into the bathroom. He then disrobed himself and the little girl and proceeded to penetrate her vagina with his penis. Mr. Allen was given a life sentence on January 9, 2002. *State v. Allen*, KA 02-593 (La. App. 3 Cir. 11/6/02), 830 So.2d 606.

16. Ronald Knightshed was found guilty of raping a six year-old girl. He fondled the victim's genitalia with his hands and then his penis. He also performed oral sex on her. After the rape, the child was diagnosed with

gonorrhea. Ronald Knightshed was sentenced to twenty (20) years. *State v. Knightshed*, 00-KA- 1410 (La.App. 5 Cir. 3/28/01), 783 So.2d 501.

17. Lester Gomez was found guilty of raping two eight-year-old boys (anally and orally) over a series of months. At the time, Mr. Gomez believed he was HIV positive. On February 2, 2001, Mr. Gomez was sentenced to life imprisonment. *State v. Gomez*, 2000-KK-0677 (La. 1/17/01), 778 So.2d 549.

18. Jearl Ramsey Plunkett was found guilty of raping a four-year-old girl. While babysitting the victim, Mr. Plunkett penetrated her with his penis and ejaculated into her vagina. Joel Ramsey Plunkett was sentenced to life imprisonment on November 18, 2002. *State v. Plunkett*, 37,306 (La. App. 2 Cir. 9/12/03), 855 So.2d 831, *writ denied* 03- 2943 (La. 2/13/04), 867 So.2d 688.

19. Jimmy Level was convicted of raping his eight-year-old niece and received a life sentence on October 23, 1996. *State v. Level*, 99-2266 (La. 12/17/99), 751 So.2d 869, *writ denied* 01- 0953 (La. 2/1/02), 807 So.2d 855.

20. Elbert Taylor was convicted of raping his six-year-old niece and was sentence to life imprisonment. *State v. Taylor,* 36,066 KA (La. App. 2 Cir. 6/12/02), 821 So.2d 633, *writ denied* 02- 2068 (La. 6/20/03), 847 So.2d 1222.

21. Bernard Williams was convicted of repeatedly raping (vaginally, anally and orally) a five-year-old girl. On one occurrence, Mr. Williams had sex with the five-year-old victim's babysitter and then proceeded to rape the victim vaginally. Bernard Williams was sentenced to life on July 16, 2004. *State v. Williams*, 05-KA-318 (La. App. 5 Cir. 1/17/06), 921 So.2d 1033, *writ denied* 04-KO-0051 (La. 5/21/04), 874 So.2d 171.

22. Latroy Oates was convicted of repeatedly raping an eight-year-old girl in her aunt and uncle's home. Mr. Oates would enter the home at night while the child was sleeping and take her downstairs where he would rape her. If she

cried out in pain, Mr. Oates would cover her mouth with his hand. Latroy Oates was sentenced to life imprisonment. *State v. Oates*, 01-KA-63 (La. App. 5 Cir. 5/30/01) 796 So.2d 941, *writ denied* 01-K-1827 (La. 6/14/02), 817 So.2d 1150.

23. Jason Marcantel was convicted of kidnapping and raping a ten-year-old girl in a wooded area near the victim's grandparent's home. When police found the victim she was filthy and disoriented. Her clothing revealed blood and fecal matter in her underwear and shorts. Mr. Marcantel was sentenced to life. *State v. Marcantel*, CR-98-825 (La. App. 3 Cir. 12/22/99), 756 So.2d 366.

24. John Kinsel was found guilty of raping a little girl repeatedly over a three year period. The abuse began when she was six years old. The victim told the jury that Mr. Kinsel threatened to kill her and her family if she ever told anyone about the abuse. He was sentenced to life imprisonment. *State v. Kinsel*, 00- KA-1610 (La. App. 5 Cir. 3/28/01), 783 So.2d 532, *writ denied* 01-K-1230 (La. 3/28/02), 812 So.2d 641.

25. Ricky E. Chatman was convicted of raping a ten-year-old girl. He first took the victim to an overgrown, deserted area. He then proceeded to take off her blue jeans, pull her underwear down and penetrate her vagina with his finger and penis. Mr. Chatman was sentenced to life imprisonment. *State v. Chatman*, 37,523 KA (La. App. 2 Cir. 9/24/03), 855 So.2d 875.

26. Ricky E. Adkins raped two girls under the age of twelve, one of whom was mentally retarded. The physician who examined the children after the rapes reported that their hymens were torn and there was substantial scarring in their genital areas. Ricky Adkins received concurrent sentences of forty (40) years. *State v. Adkins*, 31300-KA (La. App. 2 Cir. 11/9/98) 721 So.2d 1090.

27. Christopher Ross was found guilty of raping a seven-year-old girl and received a life sentence. The physician testified that the victim's genital area was very red and had

extensive abrasions and excoriations. The victim's hymen was ruptured and torn. *State v. Ross*, 03-0564 (La. App. 3 Cir. 12/17/03), 861 So.2d 888, *writ denied* 04-0376 (La. 6/25/04) 876 So.2d 829.

28. Adrian McKinnie was convicted of raping a four-year-old girl and was sentenced to life imprisonment. He penetrated the victim's vagina with his fingers and then his penis. *State v. McKinnie*, 36,997 (La. App. 2 Cir. 6/25/03), 850 So.2d 959.

29. Charles Latroy was convicted of raping an eight-year-old girl and sentenced to twenty (20) years on October 28, 1999. *State v. Oates*, 01-KA-63 (La. App. 5 Cir. 5/30/01) 796 So.2d 941, *writ denied* 01-K-1827 (La. 6/14/02), 817 So.2d 1150.

30. Levar Doughty was convicted of raping an eleven-year-old and sentenced to seven (7) years imprisonment. Mr. Doughty was fifteen years old at the time of the offense. *State v. Doughty*, 02-0496 (La. 1/10/03), 834 So.2d 435.

31. Bobby Knox was found guilty of raping a six-year-old and received a life sentence. *State v. Knox*, 02-2426 (La. 9/19/03), 853 So.2d 629.

32. Allen Maise was found guilty of raping a six-year-old and was sentenced to life imprisonment. *State v. Maise*, 805 So.2d 1141 (La. 2002).

33. Leon Simmons was found guilty of raping a five-year-old and received a life sentence. *State v. Simmons*, 03-20 (La. App. 5 Cir. 4/29/03), 845 So.2d 1249.

34. Elvis Singleton was found guilty of raping an eight-year-old and received a life sentence. *State v. Singleton*, 96-1127 (La. App. 1 Cir. 5/9/97), 698 So.2d 1070.

35. Michael Smith was convicted of raping an eight-year-old and was sentenced to life imprisonment. *State v. Smith*, 98-1193 (La. App. 5 Cir. 4/14/99), 734 So.2d 103.

36. Ralph Tate was convicted of raping a five-year-old and was sentenced to thirteen (13) years imprisonment. *State v. Tate*, 97-1242 (La. 6/30/97), 696 So.2d 1010.

37. Eddie Orange was charged with aggravated rape of child under twelve on June 2, 2006. He impregnated his eleven-year-old daughter, who subsequently gave birth to the child. Mr. Orange was also charged with raping his older daughter. AP Alert, *Man Accused of Raping Sisters, One of Whom Gave Birth*, THE ASSOCIATED PRESS, June 2, 2006.

38. Keith Raymond Fremin was convicted of raping two sisters, who were eleven and thirteen at the time of the attacks. Fremin was sentenced to twenty-five (25) years imprisonment and castrated. *Man who Pleaded Guilty to Rape Agrees to Castration*, THE BATON ROUGE ADVOCATE, July 14, 2005, Section: National.

39. Quincy Vidal Williams was convicted raping an eleven-year-old girl and received a life sentence. AP Alert, *Man to Spend Life in Prison Following Child Rape Conviction*, THE ASSOCIATED PRESS, May 14, 2006.

40. Herbert J. Prejean has been charged with raping a young girl at a motel where he had taken her to swim. Richard Burgess, *Death Ruled Out For Two Murder Suspects *** Prosecutor Undecided on Third Man*, THE BATON ROUGE ADVOCATE, April 11, 2006, Section: B.

41. Rodney Mingo has been charged with raping a three-year-old little boy. *Meet Your Neighbor*, CBS 10 KLFY-LA, April 5, 2006.

42. Richard Lee Davis has been charged with raping the five-year-old girl he was babysitting. AP Alert, *DA To Decide Whether to Seek Death in Caddo Child Rape Case*, THE ASSOCIATED PRESS, August 25, 2005.

43. Melissa Ticer has been charged with raping the five-year-old girl she was babysitting. AP Alert, *DA To Decide*

Whether to Seek Death in Caddo Child Rape Case, THE ASSOCIATED PRESS, August 25, 2005.

44. Allen Pierson has been charged with aggravated rape of a child under twelve. *Grand Jury Indicts 7 in Tangipahoa*, THE BATON ROUGE ADVOCATE, June 25, 2005.

45. Patricia Pierson has been charged with aggravated rape of a child under twelve. *Grand Jury Indicts 7 in Tangipahoa*, THE BATON ROUGE ADVOCATE, June 25, 2005.

46. Paul Fentenot has been charged with aggravated rape of a child under twelve. *Grand Jury Indicts 7 in Tangipahoa*, THE BATON ROUGE ADVOCATE, June 25, 2005.

47. Christopher Labat has been charged with aggravated rape of a child under twelve. *Grand Jury Indicts 7 in Tangipahoa*, THE BATON ROUGE ADVOCATE, June 25, 2005.

48. Robin Lamonica has been charged with aggravated rape of a child under twelve. *Grand Jury Indicts 7 in Tangipahoa*, THE BATON ROUGE ADVOCATE, June 25, 2005.

49. Louis Lamonica has been charged with aggravated rape of a child under twelve. *Grand Jury Indicts 7 in Tangipahoa*, THE BATON ROUGE ADVOCATE, June 25, 2005.

50. Dexter Troy Pounds was convicted of raping an eight-year-old girl. *State v. Pounds*, 2002-0064 (La. App. 1 Cir. 6/21/02), 826 So.2d 1202, *writ denied*, 2002-2766 (La. 9/5/03) 852 So.2d 1022.

51. Dustin McLelland was convicted of raping a five-year-old girl. *State v. McLelland*, 03-498 (La. App. 5 Cir. 10/15/03), 860 So.2d 31, *writ denied*, 2003-3372, (La. 3/26/04), 871 So.2d 347.

52. Charles Perry was convicted of raping a ten-year-old girl and sentenced to life imprisonment. *State v. Perry*, 2002-2489 (La. 9/26/03) 854 So.2d 355.

53. Rhashiedi Mohamed was convicted of raping a child under twelve. *State v. Mohamed*, 96-845 (La. App. 5 Cir. 9/17/97) 700 So.2d 881.

54. Andrew Mitchell, Sr. was convicted of raping a child under twelve. *State v. Mitchell*, 2001-1414 (La. App. 1 Cir. 2/15/02) 812 So.2d 149.

55. Charlie Finley was convicted of raping a ten-year-old child. *State v. Finley*, 2001-2506 (La. App. 1 Cir. 5/10/02), 826 So.2d 655.

56. Johnnie L. Smith was convicted of raping a nine-year-old. *State v. Smith*, 01-02-0058.

57. James Scott was convicted of raping an eleven-year-old child. *State v. Scott*, 96-1905 (La. App. 4 Cir. 3/12/97), 690 So.2d 1129.

58. Shawn Lacour was convicted of raping a child under the age of twelve. *State v. Lacour*, 01-602 (La. App. 5 Cir. 1/15/02), 810 So.2d 588, *writ denied*, 2002-0642 (La. 1/31/03), 836 So.2d 60.

59. Austin Bernard, III was charged with aggravated rape of a child under the age of twelve. Debra Lemoine, *Four Sex Counts Filed in Case Alleged Church Cult Suspect Booked with Aggravated Rape*, THE BATON ROUGE ADVOCATE, June 14, 2005, Section B.

60. David Constance was charged with aggravated rape of a child under the age of twelve. *Late Local News*, CBS 9 WAFB – Baton Rouge, March 17, 2006.

61. Patrick Brown was convicted of raping a six-year-old girl. He received a life sentence. *State v. Brown*, 1997-2260 (La. App. 4 Cir. 10/6/99), 746 So.2d 643.

62. Frazen Chesson was convicted of raping a child under the age of twelve. *State v. Chesson*, 1999-0173 (La. 2/5/99) 737 So.2d 736.

63. Stephen Titzer was convicted of raping a child under the age of twelve and sentenced to life imprisonment. *State v. Titzer*, 2001-2868 (La. App. 1 Cir. 6/21/02), 826 So.2d 1201.

64. Joseph Thibodeaux was convicted of raping a child under the age of twelve. *State v. Thibodeaux*, 1999-0857 (La. 8/25/99), 746 So.2d 1287.

65. Ryan Watson was convicted of raping a child under the age of twelve. *State v. Watson*, 02-1154 (La. App. 5 Cir. 3/25/03), 844 So.2d 198.

66. Aaron Wilford was convicted of raping a child under the age of twelve. *State v. Wilford*, 01-513 (La. App. 5 Cir. 11/14/01), 800 So.2d 453, *writ denied*, 2004-1269 (La. 3/24/05), 896 So.2d 1025.

67. Allen Vicks was convicted of raping a child under the age of twelve. *State v. Vicks*, 2000-1700 (La. App. 4 Cir. 9/26/01) 798 So.2d 308.

68. Cesar Roca was convicted of raping two children under the age of twelve and received two consecutive life terms. *State v. Roca*, 03-1076 (La. App. 5 Cir. 1/13/04) 866 So.2d 867, *writ denied*, 2004-0583 (La. 7/2/04), 877 So.2d 143.

69. Darrel McDuffey was convicted of raping a ten-year-old girl and sentenced to forty (40) years imprisonment. TV 8, *Convicted Child Rapist Sentenced to 40 yrs*, April 11, 2006.

70. Gary Sanchez was convicted of raping a five-year-old boy and sentenced to thirty (30) years imprisonment. Joe Darby, *Child Molester Sentenced in Attempted Rape Case Man Pleads Guily, Gets 30 years in Jail*, NEW ORLEANS TIMES PICAYUNE, August 9, 2003, Section: Metro.

71. Brandon Billiot was charged with two counts of aggravated rape of a child under the age of twelve. Joe Darby, *Metairie Man is Indicted in April Shooting Witnesses Said Man Argued With Victim*, NEW ORLEANS TIMES PICAYUNE, December 6, 2003, Section: Metro.

72. Gregory Brown was charged with aggravated rape of a ten-year-old girl. Mark Waller, *Jeff Jury Indicts 6 in 2 Separate Killings Suspects in the Two Cases Face Life In Jail*, NEW ORLEANS TIMES PICAYUNE, September 24, 2004, Section: Metro.

73. Shawn Esteve was charged with two counts of aggravated rape of a five-year-old girl and received a sentence of forty-nine-and-a-half (49 ½) years. Joe Darby, *Child's Rapist Pleads Guilty Terrytown Man Get Forty Nine*, NEW ORLEANS TIME PICAYUNE, August 16, 1997, Section: Metro.

74. Hector J. Perez was charged with two counts of aggravated rape of a child under twelve. Kenner Bureau, *Kenner Man Booked with Raping 8-Year-Old*, NEW ORLEANS TIME PICAYUNE, May 28, 1997, Section: Metro.

75. Ed R. Littleton was charged with aggravated rape of a child under twelve-years-old. Steve Cannizaro, *Buras Couple Booked In Rape of 11-Year-Old*, NEW ORLEANS TIME PICAYUNE, November 18, 1997, Section: Metro.

76. Sarah May was charged with being a principal to aggravated rape of a child under twelve. Steve Cannizaro, *Buras Couple Booked In Rape of 11-Year-Old*, NEW ORLEANS TIME PICAYUNE, November 18, 1997, Section: Metro.

77. Anthony Wilson was charged with raping a six-year-old girl. *State v. Wilson*, 685 So.2d 1063, 1073 (La. 1996); *see also* Rhonda Bell, *Rape Suspect OT Ready for Trial Mentally Retarded Man Faces Death if Convicted of Rape of Six-Year-Old*, NEW ORLEANS TIMES PICAYUNE, December 16, 1999, Section: Metro.

78. Danny Davis, Jr. was charged with raping three children in St. Bernard Parish. Steve Cannizaro, *Man, 18, Wanted in Sex Abuse of Minors 1 Girl, 2 Boys Say Attack Occurred in January*, NEW ORLEANS TIMES PICAYUNE, March 23, 2000, Section: Metro.

79. Ithona Nation was charged with raping a ten-year-old girl. Kenner Bureau, *Kenner Man Booked in Rape of Child*, NEW ORLEANS TIMES PICAYUNE, May 12, 2000, Section: Metro.

80. Ferdinand D. Arcourt was charged with aggravated rape of a five-year-old boy. Stephanie A. Stanley, *Abita Man Raped Boy, 5, Police Say 2 Other Men Charged In Deadly Crashes*, NEW ORLEANS TIMES PICAYUNE, March 23, 2002, Section: Metro.

81. Greg Laffavillere was charged with aggravated rape of a child. Steve Cannizaro, *Child Rape Suspect Worked Outside Jail*, NEW ORLEANS TIMES PICAYUNE, February 20, 2003, Section: Metro.

82. Brian J. Sapia was convicted of raping a six-year-old girl and was sentenced to twelve (12) years. Gwen Filosa, *Man Gets 12 Years for Raping 6-Year-Old*, NEW ORLEANS TIMES PICAYUNE, August 6, 2003, Section: Metro.

83. Thomas Farve was charged with raping a seven-year-old girl. Joe Darby, *Man Charged in Sex Crimes Against Foster Child*, NEW ORLEANS TIMES PICAYUNE, December 20, 2003, Section: Metro.

84. Ceaser Harper was charged with raping an eight-year-old girl. Staff Reports, *Man Is Arrested in Child Rape Case, Suspect Faces Death if Convicted of Crime*, NEW ORLEANS TIMES PICAYUNE, January 7, 2004, Section: Metro.

85. Roderick Riggins was convicted of aggravated rape of a child and was sentenced to forty (40) years in prison. West Bank Bureau, *Man Plead Guilty in Girl Rape*, NEW

ORLEANS TIMES PICAYUNE, January 23, 2004, Section: Metro.

86. Daniel Joseph Moore was charged with three counts of aggravated rape of a child under twelve. Meghan Gordan, *Janitor Charged In Child Sex Case Babysitter Accused of Raping Three Boys*, NEW ORLEANS TIMES PICAYUNE, July 21, 2004, Section: Metro.

87. Randy Conner was charged with aggravated rape of a four-year-old girl. Joe Darby, *Step-dad charged in Harvey Stabbing Cops Say Teen Victim May Have Been Raped*, NEW ORLEANS TIMES PICAYUNE, August 6, 2004, Section: Metro.

88. Christopher S. Shank was convicted of raping a five-year-old girl. Paul Purpura, *Jeff Man To Get Life In Rape of Child Unanimous Jury Spurns Lesser Charge*, NEW ORLEANS TIMES PICAYUNE, October 30, 2004, Section: Metro.

89. Roy A. Vanderhoff was charged with aggravated rape of a child under twelve. Amy Blakely, *1 Indicted, 1 Sought In Rape of Child, Boy Found to Have Contracted an STD*, NEW ORLEANS TIMES PICAYUNE, May 6, 2005, Section: Metro.

90. Irvin Roussel was indicted on capital rape charges for orally sodomozing a six-year old girl. Rousell told police, relatives and then the jury how he orally sodomized the girl after a night of hard drinking. Rousell even wrote a letter to Marullo admitting the crime. The jury found Rousell guilty of sexual battery, which carries a sentence of up to 10 years in prison. Gwen Filosa, *Indigent board to have day in court – New Orleans*, THE TIMES-PICAYUNE, September 23, 2006, B1.

91. Keith Raymin Fremin was sentenced to 25 years in prison, and agreed to castration, after having been charged with multiple counts of aggravated rape of two girls in Mandeville, Louisiana. Bruce Hamilton, *Child rapist*

undergoes castration, THE TIMES-PICAYUNE, November 7, 2006, B1.

92. Eric Donald Hayes was found guilty of raping an eleven-year-old and sentenced to ten (10) years imprisonment. See Exhibit B, MNT (10/2/2003).

93. Celestine Livingston was convicted of raping a six-year-old and sentenced to two (2) years on March 21, 1996. Exhibit B, MNT (10/2/2003).

94. Jason Robardi was found guilty of raping a nine-year-old girl and received a life sentence. The child lost a substantial amount of blood from the vaginal tears she sustained from the rape. See Exhibit B, MNT (10/2/2003).

95. Don Tran was found guilty of raping an eight-year-old girl and was sentenced to twenty-five (25) years imprisonment. See Exhibit B, MNT (10/2/2003).

96. Nazareth Harrison was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Parish of St. Tammany (Oct. 26, 2000).

97. Cedric Jamison was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Parish of St. Tammany (Sept. 21, 2001).

98. Ferdinand D'Arcourt was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Parish of St. Tammany (Mar. 22, 2002).

99. Christina Vanrycke was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Parish of St. Tammany (May 24, 2002).

100. Richard Carrier was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Parish of St. Tammany (Sept. 19, 2002).

101. Danny Thomas Davis was indicted for aggravated rape of a child under twelve. Aggravated Rape

Indictment, State of Louisiana, Parish of St. Tammany (June 30, 2000).

102. Gary Rush was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Parish of St. Tammany (April 25, 2001).

103. John Pratt, III was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Parish of St. Tammany (Oct. 24, 2002).

104. Michelle Littlefield was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Parish of St. Tammany (May 3, 2004).

105. Burt S. Stockstill was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Parish of St. Tammany (May 3, 2004).

106. Frazen "Pookie" Chesson was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Aug. 9, 1996).

107. Donnell Colquitt was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Mar. 16, 2000).

108. Eddie Tom Cannon was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Nov. 19, 1998).

109. Teresa Gail Cannon was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Nov. 29, 1998).

110. Stanley R. Elpers was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Sept. 23, 1999).

111. Gary Wayne Mood was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Nov. 11, 2000).

112. John Edward Hess was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Dec. 14, 2000).

113. Joseph Herbert Bargeman was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (July 19, 2001).

114. Chester Lee Marcantel was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (May 15, 2002).

115. Russell E. Fuselier was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (May 21, 2002).

116. Jimmy Dorris was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (June 13, 2002).

117. Luther Deel was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Sept. 19, 2002).

118. Timothy Benoit was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Feb. 10, 2006).

119. Brent A. Repponde was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Oct. 13, 2005).

120. James Brooks was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Aug. 25, 2005).

121. Neal P. Broussard was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Aug. 18, 2005).

122. Keith L. London was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (July 18, 2005).

123. Floyd Tillman was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (June 8, 2005).

124. Harvey T. Simons was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (May 5, 2005).

125. Dennis McGehee was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (April 18, 2006).

126. Joseph Albert Ripley was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Nov. 18, 2004).

127. James A. Fontenot was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Nov. 10, 2004).

128. Johnny London was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Sept. 30, 2004).

129. Dwayne A. Colston was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Sept. 23, 2004).

130. Joseph Molitor was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Aug. 12, 2004).

131. Ernest Chapman was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Aug. 12, 2004).

132. Carl Ledet was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Aug. 12, 2004).

133. Decator Crochet was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (May 6, 2004).

134. Carmen L. Oregeron was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (May 6, 2004).

135. John Nunez was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Mar. 3, 2004).

136. Marvin William Welsh was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Feb. 26, 2004).

137. Robert Thomas was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Feb. 26, 2004).

138. Arnold Mercado was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Feb. 26, 2004).

139. Michael W. Granger was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Aug. 14, 2003).

140. Stephen Lanphier was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Oct. 14, 2001).

141. John Mark was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Oct. 10, 2003).

142. James Wimberly, Jr. was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Oct. 10, 2003).

143. Jude Wimberly was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Oct. 10, 2003).

144. James Wimberly, Sr. was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Oct. 10, 2003).

145. Michael W. Granger was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Aug. 14, 2003).

146. Marcus Jacobs was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Aug. 14, 2003).

147. John Molitor was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (July 10, 2003).

148. Michael Wayne Guillory was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (July 10, 2003)

149. Kenneth Tittle was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (June 17, 2003).

150. Joseph Thibodeaux was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (May 22, 2003).

151. Robin LeBlanc was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (March 6, 2003).

152. Glenn Allan Duhon was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Jan. 1, 2003).

153. Mark Allen Dittmer was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Oct. 10, 2002).

154. Dustin Chad Ducote was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Sept. 12, 2002).

155. Daniel Holland was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Sept. 12, 2003).

156. Zavier Lewis was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (June 6, 2002).

157. Rock A. Doucet was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Feb. 2, 2002).

158. Brian Saltzman was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Oct. 25, 2001).

159. Emery Marcantel, Jr. was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (March 1, 2001).

160. Ellis Bartie was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Sept. 7, 2000).

161. Troy L. Williams was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Calcasieu Parish (Aug 28, 1998).

162. Donus Demon Edwards was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, St. Landry Parish (2001).

163. Alton Romar, Jr. was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, St. Landry Parish (1997).

164. Erick D. Mitchell was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, St. Landry District Parish (1987).

165. Fabian L. Mitchell was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, St. Landry Parish (1998).

166. Thomas E. Biledeaux was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, St. Landry Parish (1995).

167. Albert Jones, Jr. was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, St. Landry Parish (1998).

168. Clarence Edwards Rogers was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Grant Parish.

169. John Alden Vallery Sr. was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Grant Parish.

170. Robert Wayne Warren was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Grant Parish.

171. Barry Keith Chelette was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Grant Parish.

172. Alcide Boudoin was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Assumption Parish (2006).

173. Grady L. Rushing, Sr. was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Assumption Parish (2004).

174. Carroll C. David, Sr. was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Pointe Coupee Parish.

175. Isiah Van Buren was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Pointe Coupee Parish (Aug. 22, 2000).

176. Marcus Guidry was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Pointe Coupee Parish (April 29, 2003).

177. Michael Young was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Pointe Coupee Parish (April 29, 2003).

178. Ricky Chatman was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Morehouse Parish (Sept. 13, 2001).

179. James Watts was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Morehouse Parish (Feb 9, 2006).

180. John Freeman was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Pointe Coupee Parish (April 29, 2003).

181. Christopher Williams was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Morehouse Parish (Aug. 17, 2004).

182. David Marshall was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Morehouse Parish (April. 26, 2004).

183. Damien Lebrun was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Morehouse Parish (Aug. 15, 2003).

184. Jason P. Rebardi was indicted for aggravated rape of a child under twelve. Aggravated Rape Indictment, State of Louisiana, Morehouse Parish (Aug. 23, 2003).

B. A Significant Number Of Defendants Have Received A Sentence Less Than Death For A Worse Offense.

In *Coker v. Georgia*, the United States Supreme Court noted that murder was without doubt a more severe offense than rape:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.

Coker v. Georgia, 433 U.S. 584, 598 (1977).[7] While this Court has suggested that there is an open question

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[7] In Appellant's Brief on Appeal and Supplemental Brief on Appeal, Appellant notes that the decision in *Coker* (finding the death penalty unconstitutional for the rape of a sixteen (16) year old girl) supports the

concerning whether the rape of a child is equivalent to the murder of an adult, it is unquestionable that the murder (let alone the rape and murder) of a child remains, from a constitutional perspective, a worse offense than a rape.

In the following cases, a defendant actually killed the child-victim or child-victims, but received a lesser sentence than the Appellant in this case:

185. Ralph Stogner kidnapped, raped and killed an eleven year-old girl and received a sentence of life imprisonment in the same year Mr. Kennedy was sentenced to death. Mr. Stogner's victim disappeared from her neighborhood in Slidell, Louisiana. Her badly mutilated body was found two days later in an Industrial Canal in New Orleans. Stephanie A. Stanley, *Killer Is Sentenced for Attack on Child*, NEW ORLEANS TIMES PICAYUNE, January 5, 2002, at Section: National.

186. Darren Hooks was convicted of raping and murdering his girlfriend's two-year-old daughter. The child had lacerations and contusions, both internally and externally, all over her body. She ultimately died when her brain swelled from head injuries and a tear in her kidneys. Darren Hooks received a life sentence. *State v. Hooks*, 421 So.2d 880 (La. 1983).

187. Nathan Johnson was convicted of raping and killing his two-year-old daughter. The child died from head wounds she sustained from the attack. Her vagina and rectum indicated that she had been penetrated anally and

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claim that the execution of a defendant for a non-homicide offense is unconstitutional. Since *Coker*, this Court ruled that the rape of a child is sufficiently more severe than the rape of an adult woman to justify the imposition of the death penalty for rape made aggravated by the youth of the victim. See *State v. Wilson*, 685 So.2d 1063, 1073 (La. 1996). That decision cannot stand for the proposition that the rape of a child is worse than the murder of a child. Indeed, it is beyond purview that the position of the Court in *Coker* – that murder is a worse offense than rape – remains, regardless of whether the Court can extend the constitutionality of capital punishment to the present charge.

vaginally. Mr. Johnson was sentenced to life imprisonment. *State v. Johnson*, 96-1834 (La. App. 1 Cir. 6/20/97), 697 So.2d 288.

188. Delia Nelson was found guilty of killing her two-year-old daughter. Medical examinations revealed older and fresh bruises, and abrasions on both sides of the forehead and face; bruises on the chest, back, shoulder, genital area and legs. The child ultimately died of severe bruising of the brain. Ms. Nelson was sentenced to forty (40) years imprisonment. *State v. Nelson*, 98-1907 (La. App. 1 Cir. 6/25/99), 744 So.2d 226.

189. Ricky Langley was convicted of killing a six-year-old and received a life sentence. He strangled the little boy, carried him up the stairs and hid him under blankets. There is evidence indicating that Mr. Langley sexually molested the child before and after the murder. *State v. Langley*, 94-00326 (La.App. 3 Cir. 4/14/94), 639 So.2d 211.

190. Alvin Scott Loyd was convicted of kidnapping, raping and killing a three-year-old girl. *State v. Loyd*, 96-1805 (La. 2/13/97) 689 So.2d 1321.

191. James Koon was found guilty of beating an eight-month-old girl to death, breaking the baby's skull, forearms, right tibia, right fibula. He was sentenced to life imprisonment. *State v. Koon*, 31177 (La. App. 2 Cir. 2/24/99), 730 So.2d 503.

192. Christopher McCants was found guilty of killing a two-year-old girl and sentenced to life imprisonment. The little girl died from blunt trauma to her head which caused brain hemorrhaging. The child was also covered in lacerations caused by belt wounds. *State v. McCants*, 93-1703 (La. App. 1 Cir. 10/7/94), 644 So.2d 752.

193. William Simpson was found guilty of killing his two-year-old daughter and received a life sentence. Mr. Simpson confessed to strangling his daughter with a belt and then stabbing her with a butcher knife. *State v. Simpson*, 629 So. 2d 468 (La. App. 3 Cir. 1993).

194. Willie Lee Douglas was convicted of killing a two-year-old girl. The child's injuries indicated that she was beaten to death. Mr. Douglas was sentenced to life in prison without parole. *State v. Douglas*, 37-721 (La. App. 2 Cir. 12/10/03), 862 So.2d 390.

195. Melvin Dewayne Pugh was found guilty of killing his six-week-old daughter and sentenced to forty (40) years in prison. The baby died when Mr. Pugh struck her multiple times and threw her on the floor. *State v. Pugh*, 40,287-KA (La. App. 2 Cir. 11/02/05), 914 So.2d 1183.

196. Joseph Glenn, IV was convicted of killing a two-month-old girl and sentenced to life imprisonment on April 10, 2003. The cause of death was brain hemorrhaging brought on by Mr. Glenn shaking the baby. *State v. Glenn*, 04-KA-526 (La. App. 5 Cir. 03/01/05), 900 So.2d 26.

197. Burnell Hart was found guilty of killing an eleven-month-old girl and was sentenced to life imprisonment. The child sustained injuries all over her entire body, including brain and stomach hemorrhaging, fractured ribs and one of her lungs was filled with blood. Her liver had also been torn. *State v. Hart*, 2004-KA-0121 (La. App. 4 Cir. 08/18/04), 881 So. 2d 1237.

198. Kortney T. Smith was convicted of killing his seven-month-old infant and sentenced to life imprisonment. The child died from a skull fracture and brain hemorrhaging. *State v. Smith*, 04-KA-199 (La.App. 5 Cir. 06/29/04), 877 So.2d 1123.

199. Frank Guillory was found guilty of killing his wife and her nine-year-old son. Mr. Guillory shot to death both victims. Mr. Guillory received a life sentence on January 31, 1996. *State v. Guillory*, 95-383 (La. App. 1 Cir. 02/14/03), 839 So.2d 455.

200. Timothy Booker was convicted of killing his girlfriend's four-year-old daughter and received a life sentence. The child, found in sleeveless shirts and shorts on

December 18, 2000, was not breathing, did not have a pulse and was cold to the touch. After efforts to revive her failed, the coroner listed hypothermia, battered child syndrome, and malnourishment as the causes of the child's death. *State v. Booker*, 2002 KA 1269 (La. App. 1 Cir. 02/14/03), 839 So. 2d 455.

201. Raynell Bright was convicted of killing his six-month-old daughter and received a life sentence on June 1, 1998. Mr. Bright opened fire on his former girlfriend's mother and his daughter. The baby was shot in the heart. *State v. Bright*, 809 So.2d 1112 (La. 2002).

202. James Thomas Porter was convicted of killing his female roommate's three-year-old daughter and sentenced to life imprisonment on September 1, 1999. The child's body had burn marks on her chest and back from a steam iron, bruising about the head, face, shoulders and legs, and the skin on the buttocks had been burned severely. Ultimately, the cause of death was hemorrhaging in the brain brought on by a blow to the back of the head. *State v. Porter*, 99-1722 (La. App. 3 Cir. 5/3/00), 761 So.2d 115.

203. Loris Houston was convicted of beating to death her two-year-old son and sentenced to life imprisonment. Ms. Houston admitted to repeatedly beating her son with a broom, handle, hanger, slipper and hand. The cause of death was subdural blood clots and a skull facture. *State v. Houston*, 95-656 (La. App.5 Cir. 2/14/96), 671 So.2d 19.

204. Esther Penns was found guilty of murdering her four-year-old and sentenced to life imprisonment. While being questioned by authorities regarding the shooting of her ten-year-old son, the defendant admitted to the attempted murder of her daughter and the drowning of her four-year-old. The four-year-old's decomposed body was found the next day found hidden in the bushes. *State v. Penns*, 407 So.2d 678 (La. 1981).

205. James Felo was found guilty of killing his neighbor's four-year-old daughter. The little girl died from head injuries caused by a severe blow. Her left wrist and

right arm were also broken. *State v. Felo*, 454 So.2d 1150 (La. App. 4 Cir. 1984), *writ denied*, 488 So.2d 686 (La. 1986).

206. Yvonne Sepulvado was convicted of killing a six-year-old boy and received a sentence of twenty (20) years imprisonment. *State v. Sepulvado*, 26,948 (La. App.2 Cir. 5/10/95), 655 So.2d. 623, *writ denied*, 95-1437 (La. 11/13/95), 662 So.2d 465.

207. Larry Williams was found guilty of murdering a two-year-old girl. The child died from a blow to the head that caused a skull fracture at the base of the neck. Mr. Williams received a twenty-one (21) year sentence. *State v. Williams*, 609 So.2d 878 (La. App. 4 Cir. 1992).

208. Eugene Davis was charged and convicted of killing a six-month-old child. The cause of death was a fracture in the skull and a brain hemorrhage. The coroner concluded that the baby's head had been slammed on something very hard. Mr. Davis was sentenced to twenty-one (21) years in prison. *State v. Davis*, 562 So.2d 1173 (La. App. 4 Cir. 1990).

209. Charles Kenneth LaFleur was convicted of killing a two-year-old handicapped boy. He left the little boy's body in a box by the side of a road. The child had been severely abused before he was murdered. Mr. LaFleur received a life sentence. *State v. LaFleur*, 398 So.2d 1074 (La. 1981).

210. Gloria Aucoin was found guilty of killing an eight-year-old girl and was sentenced to life imprisonment. She strangled, stabbed, beat and drove the car over the little girl. *State v. Aucoin*, 362 So.2d 503 (La. 1978).

211. Selina Anderson was convicted of killing her eighteen-month-old daughter and given a life sentence. The dead child was found in the back of the house; the cause of death was asphyxia due to suffocation. *State v. Anderson*, 99-456 (La. App. 5 Cir. 10/26/99), 750 So.2d 1008. The state did not introduce evidence concerning the deaths of two of

her other children. Martha Carr, *Laplace Mom Convicted In Child's Death*, THE TIMES-PICAYUNE, December 4, 1998, B1.

212. Jack R. Obney was convicted of killings a three-year-old boy and sentenced to life imprisonment. The child died from a rupture in his abdominal region which was caused from being violently hit in the stomach. *State v. Obney*, 505 So.2d 211 (La. App. 3 Cir. 19871987); *writ denied*, 508 So.2d 818 (La. 1987).

213. Anita Mosley was found guilty of killing her boyfriend's eighteenth-month-old son and sentenced to life imprisonment. The child's liver was also torn down the middle causing him to go into heart failure. The state's medical examiner concluded that the death resulted from multiple blows from a broad, flat object, most probably a fist. *State v. Moseley*, 475 So.2d 76 (La. App. 2 Cir. 1985).

214. Victor Johnson was convicted of killing his girlfriend's sixteen-month-old child. The child sustained a fractured skull, tear in the liver, and abdominal injuries. Mr. Johnson received a life sentence. *State v. Johnson*, 469 So.2d 1099 (La. App. 2 Cir. 1985).

215. Helen Beck was found guilty of killing her son by slamming the window on his head twice. Ms. Beck was sentenced to life. *State v. Beck*, 455 So.2d 470 (La App. 2 Cir. 1984), *writ denied*, 446 So.2d 315 (La. 1984).

216. Larry M. Archer was convicted of killing his girlfriend's twenty-two-month-old daughter. Mr. Archer kicked the child in the abdomen which ruptured her bowels and led to peritonitis. He received a sentence of forty (40) years imprisonment. *State v. Archer*, 96-2750 (La. App. 1 Cir. 11/7/97); 709 So.2d 1093; *writ denied*, 97-3047 (La. 4/2/98), 717 So.2d 646.

217. Monica Lynn Guzman was found guilty of killing his seven-month-old daughter and sentenced to forty (40) years in prison. Both of the baby's legs were broken, her spine was separated, fluid in the chest and her kidneys

were in shock. *State v. Guzman*, 95-444 (La. App. 5 Cir. 11/15/95), 665 So.2d 512, *writ denied*, 95-2853 (La. 2/28/96), 668 So.2d 366.

218. Larry A. Cushman was found guilty of killing his seventeen-month-old stepson and sentenced to thirty (30) years in prison. The child died from intracranial injuries caused by head trauma and an autopsy revealed physical abuse. *State v. Cushman*, 94-336 (La. App. 3 Cir. 11/2/94), 649 So.2d 639, *writ denied*, 95-2045 (La. 3/7/97), 689 So.2d 1370.

219. Richard Hubmer was found guilty of killing a two-year-old boy and received a twelve (12) year sentence. The child died from a blow to the head that caused a skull fracture. *State v. Hubmer*, 553 So.2d 1056 (La. App. 3 Cir. 1989); *writ denied*, 560 So.2d 11(La. 1990).

220. Belverly White was convicted of killing her adopted four-year-old daughter. The evidence established that Ms. White beat the child with objects such as combs, knives and brushes. The child also sustained third-degree burns over her body. The ultimate cause of death was a massive infection brought on by the abuse to the child's body. *State v. White*, 543 So. 611 (La. App. 2 Cir. 1989).

221. Carolyn Bolden was convicted of killing a two-year-old child left in her care during the mother's incarceration. The child died from brain injuries sustained from severe, intentional shakings. Ms. Bolden was sentenced to twenty (20) years imprisonment. *State v. Bolden*, 501 So.2d 942 (La. App. 2 Cir. 1987).

222. Roger Addison was convicted of killing his girlfriend's sixteen-month-old child and received a ten (10) year sentence. The child's body had a lacerated liver, bruises on the face, head, back and buttocks and broken ribs. *State v. Addison*, 464 So.2d 887 (La. App. 4 Cir. 1985).

223. Bernard Hayes was found guilty of killing his two-year-old son and received a fifteen (15) year sentence. The little boy died from trauma caused by multiple blows to

the head. *State v. Hayes*, 446 So.2d 1233 (La. App. 4 Cir. 1985).

224. James Lois Humphrey was convicted of killing his two infant daughters. One daughter died from head injuries and the other from a neurogenic show from the brain stem and spinal cord injuries resulting from a fracture of twisting of one of the neck vertebrae. Mr. Humphrey received consecutive fifteen (15) year sentences. *State v. Humphrey*, 445 So.2d 1155 (La. 1984).

225. Curtis Germain was convicted of killing his three-year-old daughter. The child's body had bruises of all colors over the entire body. The cause of death was hemorrhaging in the left part of the brain. Testimony established that the Mr. Germain beat the child with a belt regularly and threatened to kill the entire family. He received a twenty-one (21) year sentence. *State v. Germain*, 433 So.2d 110 (La. 1983).

226. Renee Morris was found guilty of killing her infant son. The degree of bruising all over the child's body made it a classic case of battered child syndrome. The child ultimately died from a skull fracture caused by massive trauma to the head. Ms. Morris was sentenced to forty-two (42) years. *State v. Morris*, 429 So.2d 111 (La. 1983).

227. Deborah Crawford was found guilty of murdering her nine-month-old daughter. The child died from head trauma inflicted by multiple blows. Ms. Crawford received a twenty-one (21) year sentence. *State v. Crawford*, 410 So.2d 1076 (La. 1982).

228. Delia Nelson was found guilty of killing her two-year-old daughter. Medical examinations revealed older and fresh bruises, and abrasions on both sides of the forehead and face; bruises on the chest, back, shoulder, genital area and legs. The child ultimately died of severe bruising of the brain. Ms. Nelson was sentenced to forty (40) years imprisonment. *State v. Nelson*, 98-1907 (La. App. 1 Cir. 6/25/99), 744 So.2d 226.

229. Whitney Spenser was sentenced to life for four counts of first degree murder arising from the intentional burning to death of 14-month-old Keitwon Ester, six-year-old Ranneisha Kent, seven-year-old Deaunta Kent, and four-year-old Branika Murph. See *State v. Spencer*, 00-2084, Division A, 24th JDC, Jefferson Parish.

230. Eric Matthews was sentenced to life imprisonment for two counts of first degree murder and one count of second degree murder, including the murder of a one-year-old child. *State v. Matthews*, 1997-1757 (La. 1/16/98) 706 So.2d 972.

231. Perry Pooler and Simon Hutchinson were indicted for the murders of Joseph Curry age 17, Daytoria Curry age 16, and Jacorey Marshall age 16 months. Joseph Curry was shot execution style. Daytoria Curry was raped and then shot execution style. Both were ultimately sentenced to life imprisonment. Marshall was burned in the trailer fire. See e.g. *State v. Hutchinson*, 2001--0704 (La.App. 1 Cir. 12/28/01); 803 So. 2d 1120; *State v. Pooler*, 96 1794 (La.App. 1 Cir. 05/09/97); , 696 So. 2d 22.

232. Lawrence Robertson, Dameion Tillman and Corey Richardson were indicted for the first degree murder of Chastity Calhoun, age 2. They were also charged with the murder of the girl's father Kevin Calhoun. Robertson pled guilty to the killing of Chastity Calhoun and received a ten (10) year sentence. See *State v. Robertson*, 409-923 "E" (Orleans Parish Criminal District Court). Each of the other co-defendants pled guilty to a lesser offense and received a term of years.

233. James Davis was indicted for the first degree murder of Terica Toledano, age 2. He ultimately pled guilty to manslaughter and received a sentence under ten years. See *State v. Davis*, 387-332 "A" (Orleans Parish Criminal District Court.

II. THE CIRCUMSTANCES OF THIS CASE MAKE THE DEATH PENALTY AN EXCESSIVE AND DISPROPORTIONATE SENTENCE

Assuming, *arguendo*, the constitutionality of the death penalty for aggravated rape, the circumstances of this case render the sentence excessive and disproportionate. See *State v. Sonnier*, 380 So. 2d 1 (La. 1979). In *Sonnier*, this Court observed:

> The mere existence of a three step process indicates that a death sentence may be excessive even if sufficient ground exists for each aggravating circumstance found by the jury. . . . Certainly an inference of arbitrariness would arise if a jury's recommendation of death was inconsistent with sentences imposed in similar cases from the same jurisdiction. Rule 28, § 1(c). Another indication of arbitrariness would be a jury's recommendation of death in disregard of numerous and persuasive mitigating circumstances which clearly outweigh any aggravating circumstances found to be present. In the instant case, our review demonstrates that the sentence is excessive under either standard.

State v. Sonnier, 380 So. 2d 1, 7-8 (La. 1979).

A. The Circumstances of Patrick Kennedy's Mental limitation and Cognitive Deficits Makes the Death Sentence Excessive and Disproportionate.

Patrick Kennedy has an I.Q. of 70. It is also unlikely that Mr. Kennedy has ever had a higher I.Q. Mr. Kennedy was diagnosed with learning problems when he was child and assigned to special education classes. Despite being put in special education, he continued to perform poorly in school and on standardized tests. Mr. Kennedy's formal education ended in the ninth grade.

At the beginning of Mr. Kennedy's trial, defense counsel moved to bar the State from seeking the death

penalty based on the United States Supreme Court's prohibition on the execution of mentally retarded defendants in *Atkins v. Virginia*, 536 U.S. 304 (2002). However, at the time this case went to trial, Article 905.5, which codified the *Atkins* decision in Louisiana law, was not yet enacted. The trial court thus decided it could not be applied and went on to appoint a sanity commission to assess Mr. Kennedy's retardation per this Court's decision in *State v. Williams*, 2001 1650 (La. 11/01/02); 831 So. 2d 835.

The examining doctors from the sanity commission reported that throughout their interviews with Mr. Kennedy, he remained adamant that he was not mentally retarded and instructed the doctors to diagnose him as "normal" – even though a finding of mental retardation would ameliorate greatly to his benefit. Eventually, they were able to conduct their evaluations to determine that Mr. Kennedy's I.Q. score and to find out about his developmental history. The commissioners determined that Mr. Kennedy was not mentally retarded asserting: 1) that an IQ score of 70 was not below two standard deviations of the norm; 2) that evidence of adaptive deficits in two or more life-skills areas did not exist; and 3) that despite evidence that Mr. Kennedy was in special education, did not pass ninth grade, and did poorly on standardized testing, there was insufficient evidence that onset of low-IQ occurred prior to the age of 18. The trial court adopted the committee's conclusion and held that Mr. Kennedy was not mentally retarded and therefore competent to stand trial for capital rape.

Contemporaneously to these proceedings, the State moved to bar defense counsel from asserting that Mr. Kennedy's mental retardation constituted a bar to the imposition of the death penalty. The State based its motion on prospective application of the Article 905.5 which would – when enacted – require full cooperation as a prerequisite to litigating this matter before the jury; Mr. Kennedy, the state alleged, was not initially cooperative with the sanity commission doctors. After learning of the sanity commission's results, the trial court reversed itself and ruled

that Article 905.5 applied retroactively and barred the defense counsel from litigating Mr. Kennedy's mental retardation in front of the jury. Thus, having at first held that Article 905.5 did not apply, thereby depriving Mr. Kennedy of the benefit of the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002), codified in this article, the trial court later reversed itself to hold that Article 905.5 did apply, and held on this basis that because Mr. Kennedy did not provide the "full" cooperation required by the article, he could not rely on mental retardation as a grounds to oppose the death penalty, the very holding of *Atkins* in the first place.

The trial court's approach is reminiscent of Tweedledee's statement to Alice in *Through the Looking Glass*, "Contrariwise, if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't." It would be laughable – if its purpose wasn't to sentence a man to death.

B. The Circumstances Of The Injuries Inflicted On The Victim Make The Death Penalty Excessive.

At trial, and on appeal, the defense has not contested that [L.H.] was not raped. Nor has the defense contested that the rape – whoever committed it – was a vicious attack on the humanity of [L.H.]. The record on appeal, nevertheless, respectfully details the healing powers exhibited by [L.H.] and the significant difference between a murder and a rape.

To explain why the death penalty for a rapist was a disproportionate sentence, Justice Stewart wrote, "for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." *Coker*, 433 U.S. at 597. This proved true for the rape victim in this case, [L.H.], whose life certainly "was not over and not beyond repair."

[L.H.] underwent surgery to repair a tear in her vaginal cavity after she was raped. Dr. Scott Benton testified that "after two days the swelling is gone" and that the genital area came "back to normal in two weeks." Referencing

photographs of the injuries displayed at trial, Dr. Benton testified:

> After two days, the swelling is gone, and you see the stitches kind of holding the skin together.
>
> Children heal incredibly rapidly, one of the remarkable values of youth. This is a two week follow up, which is typical for what we do, and it shows you what, what some evidence of repair, normal, really should look like. . . . And almost without a scar, again, fairly traumatic healing, you can still see some of the, what we call absorbable sutures, are still kind of poking in and visible, and there's, you know, obviously, an injury to the hymen there, that may never heal, but it's functional, these things have come back to normal in two weeks.

In addition to her physical injuries, [L.H.] also appeared to recover quickly from the emotional trauma. Office of Career Services records lodged with the appellate record show that [L.H.] indicated no fear or psychological disturbance in the weeks and months following the rape, "[L.H.] appeared to be a very active and friendly 8 year old. She did not appear distraught, depressed or in any way saddened by the event of the rape."

To execute Patrick Kennedy for a crime in which the victim was physically "back to normal" and "emotionally stable" after only a few weeks would be a shameful use of the death penalty.

C. The Death Penalty is Disproportionate and Excessive Given the Heightened Chance of Wrongful Convictions in this Case.

There has been heightened concern in the lacunae between the decision in *State v. Wilson*, and this date, concerning the chance of error in capital cases. In *Atkins v. Virginia*, one of the grounds on which the Court based its decision to invalidate the death penalty was its observation that mentally retarded defendants face a special risk of

wrongful conviction. See *Atkins*, 536 U.S. 304, 321 (2002) (holding death penalty unconstitutional for defendants with mental retardation because of heightened risk of wrongful conviction)[8]

Rendering the risk of wrongful conviction a relevant factor in assessing the excessiveness of the death penalty, counsel must observe that defendants charged with aggravated rape of a child similarly face a special risk of wrongful execution. The rate of wrongful convictions for rape exceeds that for any other crime. ROB HALL, RAPE IN AMERICA 105 (1995). A study of exonerations during 1989-2003 revealed that 90% of non-homicidal exonerations involved rape cases. *Gross, Innocence In Capital Sentencing: Exonerations in the United States* 1989 through 2003, 95 J. CRIM. L. & CRIMINOLOGY 523, 530 (2005). This high level of unfounded allegations among rape cases can likely be attributed to the prosecution's heavy reliance on testimony from the child-rape victims. *State v. Wright*, 598 So. 2d 561, 564-65 (La. App. 4th Cir. 1992) (well-settled that testimony of child-victim in rape case, without more, is sufficient to prove elements of the offense). Because courts afford great deference to a rape victim's testimony, many of

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[8] In *Atkins*, the Court observed that the death penalty was unconstitutional in that instance because "Mentally retarded defendants in the aggregate face a special risk of wrongful execution." Id. The Court went on to observe:

> . . . Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. As two recent high-profile cases demonstrate, these exonerations include mentally retarded persons who unwittingly confessed to crimes that they did not commit.

Id at 321, n.25 citing See Baker, *Death-Row Inmate Gets Clemency; Agreement Ends Days of Suspense*, Washington Post, Jan. 15, 1994, p. A1; Holt & McRoberts, *Porter Fully Savors First Taste of Freedom; Judge Releases Man Once Set for Execution*, Chicago Tribune, Feb. 6, 1999, p. N1.

these exonerations occurred only because of DNA evidence. Innocence In Capital Sentencing: Article, 95 J. CRIM. L. & CRIMINOLOGY 531 (finding that 87% of rape exonerations occurred because of DNA evidence).

The risk of wrongful conviction is especially great when the conviction, as in this case, results primarily from a child-witness's testimony. Studies suggest that child-witness testimony is more likely to be inaccurate than adult testimony. See James O'Brien Jr., Television Trials and Fundamental Fairness: The Constitutionality of Louisiana's Child Shield Law, 61 TUL. L. REV. 141, 150 (1986) (citing BERLINER & STEVENS, ADVOCATING FOR SEXUALLY ABUSED CHILDREN IN THE CRIMINAL JUSTICE SYSTEM 13 (Nov. 1976)). Children have inaccurate memories, an inability to communicate effectively the events they recall, and a subjective sense of time. Id. They are also subject to "memory-fade," meaning adults have better capacity to "remember" retained information. Loftus & Davies, *Distortions in the Memory of Children*, 40 J. SOC. ISSUES 51, 54 (1984) (in general, children have greater difficulty than adults in retrieving information from long-term memory). Other studies indicate that child-witnesses can be subject to an increased level of suggestibility by opposing counsel. Douglas P. Peters, *The Influence of Stress and Arousal on the Child Witness*, in The Suggestibility Of Children's Recollections, 75 (John Doris ed. 1991).

The reliance on a child-witness, combined with above problems, indicates a higher rate of false child-rape allegations and convictions. See John Johnson, *"Kids Don't Lie": Faith in this Assumption Led to Dozens of Unjust Molestation Convictions in Bakersfield; Today One Man Remains in Prison Even After Four of his Original Accusers Said he Never Touched Them*, L.A. TIMES, Aug. 10, 2003, § 9 at 16; see also Child Protection: Balancing Diverging Interests: Hearing Before the Senate Comm. on Labor and Human Resources and the Subcomm. on Children and Families, 104th Cong. (1995) (statement of father wrongly convicted of raping daughter, based primarily on daughter's testimony coerced by therapist). Consequently, allowing child-rape to

be punished by death increases the likelihood of wrongful executions.[9]

Regardless of the general propriety or constitutionality of imposing a death sentence for aggravated rape, the facts in this case suggest that the imposition of an irrevocable punishment is excessive. There is no DNA evidence establishing that Mr. Kennedy committed the rape of [L.H.]. The only evidence directly connecting Mr. Kennedy to the offense is the testimony of [L.H.], which came some five years after the offense. During the first three years after the offense, [L.H.] steadfastly insisted that Mr. Kennedy was not responsible, claiming that two neighborhood teenagers were responsible. Indeed, the only way the State secured a conviction at all was through the delayed disclosure of exculpatory evidence (an exculpatory videotape and test results indicating that the blood on the mattress pad did not belong to the victim or the defendant in this case) until such time as the victim in this case changed her testimony and identified the defendant as the perpetrator. That the victim made a variety of inconsistent statements throughout the proceeding does nothing to further confidence in the outcome of this extraordinary case.

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[9] Louisiana's death row is currently the twelfth largest in the country, with eighty-seven inmates immured there. See BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1 (2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf. Since 1976, Louisiana has executed twenty-seven people, ranking it tenth among the states that authorize imposing the death penalty. Id. at 9. But Louisiana ranks third (behind only Florida and Illinois) in the number of exonerations during that same time period, with eight. Death Penalty Information Center, State by State Information: Louisiana, http://www.deathpenaltyinfo.org/state/ (last visited Nov. 2, 2006). That is, for every four executions in Louisiana there has been at least one wrongfully convicted inmate on death row. Given its population, per capita, Louisiana leads the nation in wrongful convictions. Because of the high level of wrongful convictions in rape cases, and the inability to rely fully on a child victim's testimony, imposition of the death penalty based solely on the testimony of a child-witness renders the death sentence excessive.

CONCLUSION

Mr. Kennedy would be the first person executed for a non-homicide rape in Louisiana for over fifty years. Assuming, *arguendo*, the constitutionality of the capital rape statute, the imposition of the death penalty on Mr. Kennedy is excessive, wanton, arbitrary and freakish.

Given the circumstances of the evidence in this case – no D.N.A., the late disclosure of exculpatory evidence, and the contradictory statements made by the State's only witness – the imposition of the death penalty creates an unnecessary risk of wrongful conviction. Given the fact that there have been hundreds of other defendants indicted for capital rape who have not received the death penalty, it plainly appears that the sentence in this case – where the victim recovered in days or weeks after the offense – is wanton or freakish. Moreover, given the fact that dozens of defendants have received lesser sentences for far worse offenses, the imposition of the death penalty in this case appears excessive and unnecessary.

Accordingly, if Kennedy's conviction is not reversed or this case remanded for other errors in the penalty phase to be corrected, then, for the reasons set forth herein, Defendant-Appellant Patrick Kennedy prays that his death sentence be vacated.

Respectfully submitted,

/s/_____

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IN THE

SUPREME COURT

FOR THE

STATE OF LOUISIANA

NO. 2005-KA-1981

STATE OF LOUISIANA,
APPELLEE

VERSUS

PATRICK KENNEDY,
APPELLANT

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, NO. 98-1425 DIVISION "0," THE HONORABLE ROSS LADART, JUDGE PRESIDING.

RULE 28 CAPITAL SENTENCE REVIEW MEMORANDUM

MAY IT PLEASE THE COURT:

The Office of the District Attorney submits the following in compliance with Louisiana Rule 28, Section 4: 1) a list of each first degree murder case in the Twenty-Fourth Judicial District in which sentence was imposed alter January 1, 1976 as required by Rule 28, Section 4(b)(I); and 2) a list of

each capital rape case[1] in which sentence was imposed after August 15, 1995.

1) The following is a list of each Degree Murder case in the Twenty-Fourth Judicial District in which sentence was imposed after January 1, 1976.

(1) State of Louisiana vs. Willie J. Marse, Jr.
Docket No. 77-1689 Division "A"
Crime Convicted: Manslaughter
Sentence: 21 years
***State v. Marse*, 365 So.2d 1319 (La. 1978)**

Ola Mayeux, Willie Marse's former girlfriend, was approaching the door of her home when Willie Marse pulled up in front of her house. Fearing Marse, Ola Mayeux left her home and called the police. The police went to Marse's residence in order to talk with him. Marse, refusing to cooperate, locked himself in his house and began to curse and threaten the officers. When Marse opened the door slightly, an officer saw him with a rifle in his hand. In an effort to knock the weapon from Marse's hand, the officer hit the door. As Marse forced the door closed, the officer's fist went through the door, knocking a hole in the door. Marse stuck the rifle barrel through the hole in the door, opened fire, and mortally wounded an officer.

On August 2, 1977, Willie I. Marse was indicted for the crime of first degree murder of Merlin Brume. On October 29, 1977, the jury returned a verdict of guilty of manslaughter. His conviction and sentence were affirmed.

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[1] Included in the listing are those cases which were instituted or initially prosecuted as capital cases, where the State subsequently noticed its intention not to seek a capital verdict, and which resulted in a plea of guilty to the charge of aggravated raped of a juvenile under twelve, or trial on the charge of aggravated rape of a juvenile under twelve.

(2) State of Louisiana vs. James A. Andrews
Docket No. 77-1834 Division "G"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Andrews*. 369 So.2d 1049 (La. 1979)**

On the evening of August 8, 1977, defendant was playing football with Herbert Harris and other neighborhood teenagers in Marrero. At some point, defendant and Hams began to argue, apparently over who was the better football player, but no physical fight took place. However, defendant announced that he was going home to retrieve his tennis shoes. A short while later, defendant returned, armed with a knife, walked up to Harris and stabbed him fatally in the in the heart. Defendant then left the scene, but was later arrested.

Andrews was tried and found guilty of first degree murder. Andrews was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. On March 5, 1979, Andrews' conviction and sentence were affirmed.

(3) State of Louisiana vs. Kevin Manieri and Sheldon Manieri
Docket No. 77-2253 Division "C"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Manieri*, 378 So.2d 931 (La. 1979)**

The defendants Kevin and Sheldon Manieri and Tim Mosely went to the residence of Cheryl Black for the purpose of purchasing marijuana. The eleven year old victim, Chris Black, admitted the defendants into his house where they learned that the victim's mother was at work. Kevin Manieri, having smoked marijuana at the house on a previous occasion, telephoned the victim's mother to inquire about a purchase, but the phone call ended with a request by Ms. Black that they leave the house. Defendants left the house and went to a neighborhood park where Timothy Mosely overheard them discussing "something about killing something or someone." Mosely testified that

the three returned to the Black residence, where they were again admitted by the victim, on the pretense of needing to use the bathroom: Mosely further testified that after gaining entrance, Kevin Manieri came out of the bathroom with a rubber hose which he used to strangle Chris Black. The other boys ransacked the house in search of marijuana. In order to appear as though a robbery had occurred Kevin Manieri broke the back door upon leaving the house.

On October 14, 1977, Kevin and Sheldon Manieri were indicted for first degree murder. The jury returned a unanimous verdict of guilty as charged against both defendants. The jury recommended that the defendants be sentenced to life imprisonment without the benefit of parole, probation or suspension of sentence. On December 13, 1979, both defendants' convictions and sentences were affirmed.

(4) State of Louisiana vs. Anthony Riggins
Docket No. 77-1342 Division "K"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Riggins*, 388 So.2d 1164 (La. 1980)**

Anthony Riggins murdered Peter M. Davenhauer, an unarmed 68 year old man, while he was in the process of closing his place of business located in Gretna, Louisiana. A witness testified that Davenhauer never carried any type of weapon on his person. Riggins shot the victim approximately four times with a .38 caliber handgun. Davenhauer fell to the ground alter the first shot. Riggins then stood over Davenhauer and shot him in the face and head until the gun was empty. There was an eye-witness who testified to the shooting at the trial. Riggins later told Karl Lewis about the shooting and left the gun with Lewis. Lewis concealed the gun at his home. The gun was found and used as evidence. Riggins was arrested while under his house.

Anthony Riggins was indicted for first degree murder, tried and found guilty as charged. On November 23, 1977, defendant was sentenced to life imprisonment. On

September 10, 1980, defendant's sentence and conviction were affirmed.

(5) State of Louisiana vs. Winston Love
Docket No. 78-774 Division "G"
Crime Convicted: First Degree Murder
Sentence: Life
Remanded, New Conviction: Manslaughter
Remanded, New Sentence: 21 Years
***State v. Love*, 410 So.2d 1045 (La. 1982)**

At approximately 6:00 a.m. on December 10, 1977, the body of the victim was found lying in front of an apartment on Warren Street in Kenner, Louisiana. The victim, who had been shot once in the head, was identified as David Epperson. Investigation by the police led them to the Who Cares Lounge, where interviews with lounge employees and patrons revealed that the victim had left the bar earlier that morning, at about the same time as defendant. A lounge employee, Bonnie Lamkin, recalled being introduced to Love that morning by a longtime customer named Steve Henthorne. Henthorne had asked Lamkin to place Love's pistol behind the bar and was given permission to do so himself. On the afternoon after Epperson's murder, Lamkin checked the cabinet where Henthorne had placed the pistol and it was no longer there. Defendant's former girlfriend testified that Love had blood on his clothing when he came home on the morning of December 10, 1977. Another of defendant's girlfriends testified that in February of 1978 Love told her that he had once killed a man.

Winston Love was found guilty of first degree murder and sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. On March 1, 1982, the Supreme Court reversed and remanded Love's conviction and sentence. Subsequently, Love pled guilty to manslaughter.

(6) State of Louisiana vs. Richard E. Butler
Docket No. 78-1329 Division "C"
Crime Convicted: Manslaughter
Sentence: Five Years
***State v. Butler*, 388 So.2d 1164 (La. 1980)**

On the evening of May 26, 1978, the defendant Richard Butler was at Aaron's Lounge in Harvey. Present that evening was also the defendant brother-in-law, Joseph Tate. Three eye-witnesses testified at trial that they observed the defendant engage in a scuffle with Tate, and shoot him in the head at close range, killing him. The defendant was arrested on May 27, 1978, after having been advised of his Miranda warnings. A search of defendant's car pursuant to a search warrant produced the weapon used in the shooting. After arriving at the Jefferson Parish Sheriff's Office, defendant was again advised of his rights, and after he signed the standard rights form, the defendant made an oral statement to the police admitting the shooting, but denying that it was intentional.

On September 29, 1978, a bill of indictment was filed charging the defendant with first degree murder. At trial the defendant took the stand in his own defense admitting there was an argument between himself and the victim, but denying the shooting.

On November 9, 1978, a jury of twelve returned a verdict of guilty of manslaughter after approximately three hours of deliberations. Butler's conviction and sentence were affirmed September 10, 1980.

(7) State of Louisiana vs. Benjamin Berry
Docket No. 78-2151 Division "B"
Crime Convicted: First Degree Murder
Sentence: Death
***State v. Berry*, 430 So.2d 1005 (La. 1983)**

On January 30, 1978, at approximately 11:15 a.m., Benjamin Berry walked into a Metairie Bank and Trust Company, drawing a gun. The defendant shot at the policeman on security guard duty, Robert Cochran. Shots

were fired: one hit the policeman in the arm, causing him to fall to the floor, and a subsequent shot was fired into the back of his head. At the time of the shooting, there were approximately twelve people in the bank. Deputy Cochran did fire one shot with his service revolver, which struck defendant. The defendant was seen running out the bank after the shooting. After an investigation, a warrant was obtained to search the body of the defendant. The search revealed one spent pellet taken from the defendant's back. Deputy Cochran subsequently died from a bullet wound to the head.

On September 5, 1978, a grand jury indictment was filed charging the defendant with first degree murder. The three aggravating circumstances returned under La. C.Cr.P. art. 905.4 were: offender engaged in the perpetration of armed robbery; the victim was a policeman engaged in lawful duties; more than one person's life was in danger. The defendant took the stand in his own defense, alleging that he did in fact plan an aimed robbery, but that the police officer was not intentionally shot.

Benjamin Berry's conviction and sentence were affirmed on appeal and on June 7, 1987, he was executed.

(8) State of Louisiana vs. Henry Moses and Joseph Wilson
Docket No. 78-2490 Division "F"
Crime Convicted: First Degree Murder
Sentence: Life
Remanded, New Conviction: Manslaughter
Remanded, New Sentence: 37 Years
***State v. Wilson*, 404 So.2d 968 (La. 1981)**

The incident took place on Sunday, September 17, 1978, at the Oakwood Shopping Center in Gretna. The victim and approximately eighteen other males had gathered in the shopping center. Most of these individuals belonged to a group known as the King of Kegs. The group was drinking beer and generally conversing among themselves. Wilson and Moses were also in the parking lot when a confrontation took place between them and the group of

white men, in the course of which defendants pulled out their guns and fired several shots. One of the bullets struck the victim, fatally wounding him. Immediately thereafter, some of the men in the group severely beat Moses, and ran over Wilson with a van for the ostensible purpose of self-defense, or arrest, or both.

Wilson and Moses were indicted, tried and convicted of first degree murder and sentenced to life imprisonment. On September 28, 1981, the Supreme Court reversed and remanded the convictions and sentences of both defendants. After remand, both defendants entered pleas of guilty and were sentenced as multiple offenders.

(9) State of Louisiana vs. Reginald Smith
Docket No. 78-2600 Division "A"
Crime Convicted: First Degree Murder
Sentence: Death
***State v. Smith*, 391 So.2d 1182 (La. 1980)**

The victim, Conrad Saluto, and three companions had driven into the crowded parking lot of the Courtyard Lounge in Marrero near Barataria Boulevard on the service road which runs parallel to the West Bank Expressway. According to testimony adduced at trial, one of the victim's companions was parking his car in the parking lot, and the victim and his two other friends were standing near a parked carat the corner of the parking lot. As they were talking, they heard what sounded like gunshots coming from the service road area. They immediately began running away from the direction in which the shots were fired. The victim was shot once in the back and died en route to the hospital. None of the victim's friends saw the assailant.

There was one eyewitness to the shooting, Mark Alley, who was driving on the West Bank Expressway, and was stopped for a red light when he heard a gunshot He looked toward the source of the sound and saw a man with a gun standing in the service road area facing the lounge parking lot. A second man was running toward Barataria on the service road. The man with the gun fired two additional

shots in the direction of the parking lot, and the man running stopped and looked back toward the parking lot. The pair began running down Barataria across the West Bank Expressway directly in front of Alley's truck. At first Alley followed the pair to a food store parking lot. He abandoned his pursuit when he saw a sheriffs unit, which he followed to the hospital.

Smith was indicted, tried and found guilty of first degree murder and sentenced to death. The knowing creation of risk of death or great bodily harm to more than one person was indicated as the aggravating circumstance. Smith died of natural causes in January of 1983.

(10) State of Louisiana vs. Paul C. Hartman
Docket No. 78-2928 Division "I"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Hartman*, 388 So.2d 688 (La. 1980)**

On December 4, 1978, the defendant stopped at the Tiki Lounge in Jefferson Parish to talk to his ex-girlfriend, Linda Creppel. When he entered the lounge, he saw Ms. Creppel dancing with Johnny Schwartz. The defendant, angered by his observation, started an argument with Ms. Creppel and Schwartz. After hostile words were exchanged, the defendant went to get his knife from his truck and returned to the bar. The argument continued and an altercation ensued between the defendant and Schwartz. During the struggle, the defendant fatally stabbed Schwartz. Hartman was convicted of first degree murder and sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. His conviction and sentence were affirmed on September 3, 1980.

(11) State of Louisiana vs. William Barnes
Docket No. 79-1376 Division "B"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Barnes*, 414 So.2d 711 (La. 1982)**

The victim was sitting in his car in a parking lot when all of a sudden another car, with the defendant William Barnes and codefendant Junior Bazile in it, pulled beside him. Barnes walked to the victim's car, pulled out a revolver and "executed" him. The first shot smashed the car window and the second shot was fired as the defendant placed the gun on the man's chest. A cab driver happened to be passing the scene, heard a shot and as he looked up, he saw defendant thrust his arm into the driver's side of the vehicle and fire a second shot. The victim died of a bullet through the heart. The eyewitness radioed a description of the killers to the police and followed the fleeing defendants until the police actually stopped the getaway car. The cab driver never lost sight of the defendants in the chase. The arrest was made by the police in hot pursuit of the defendant. The crime occurred on May 20, 1979, requiring prosecution under the statute which was in effect prior to the repeal of the first degree murder statute by Acts 1979, no. 74, effective June 29, 1979. The eyewitness specifically testified he witnessed the incident from about 100-125 feet from the scene. He also positively identified defendant as the killer.

Barnes was found guilty of first degree murder and after two hours of deliberations without any indication of deadlock, was sentenced to serve life imprisonment without benefit of parole, probation or suspension of sentence. On November 21, 1981, Barnes' conviction and sentence were affirmed.

(12) State of Louisiana vs. David Raymond
Docket No. 79-233 6 Division "B"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Raymond*, 412 So.2d 107 (La 1982)**

Melvin Guidry, a clerk at Coulon's Hardware Store, testified that David C. Raymond entered the store and asked Donald Coulon, the owner of the store, for an 18-shot pistol. The defendant pulled out a .38 special, pointed the gun at Donald Coulon's face, and demanded bullets for a .45 Browning automatic. Melvin Guidry testified that the defendant said, "If you don't give it to me, I'll shoot you," when Donald Coulon did not surrender the ammunition. Donald Coulon then rushed the defendant, Melvin Guidry attempted to grab the gun, and the gun went off. Donald Coulon was mortally wounded. Melvin Guidry, who was also shot, fled and sought help across the street. Melvin Guidry positively identified the defendant as the assailant. Raymond was indicted, tried and found guilty as charged. Killing while engaged in a felony and intent to kill more than one person were the two aggravating circumstances.

He was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. On April 14, 1982, Raymond's conviction and sentence were affirmed by per curium.

(13) State of Louisiana vs. Charles Lane
Docket No. 79-2841 Division "G"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Lane*, 414 So.2d 1223 (La. 1982)**

On September 28, 1979, the Gretna Police Department responded to a request to proceed to 928 Porter Street, Gretna, in reference to an aggravated battery. Upon arrival at the residence they found Frances Arwood badly beaten, extremely burned, mutilated and, for all intents and purposes, clinically dead. She was immediately transferred to West Jefferson Hospital in a comatose state. Shortly thereafter she was transferred to Charity Hospital's burn

unit where she remained for approximately two months before she died.

The evidence revealed that Robert Sawyer and Charles Lane returned to the above stated residence on the morning of September 28, 1979, after they had been drinking the night before. At the residence they met Cynthia Shano, who was Robert Sawyer's common law wife, and the victim, who was a friend of Shano's and also the babysitter of Shano's two children: Wayne, age four and Troy, age two.

Sometime that morning an argument ensued between Sawyer and Arwood and Arwood was administered a beating by Sawyer. Tempers cooled for a short period of time, but Sawyer, for whatever reason, began punching and kicking the victim over all parts of her body. At this point Lane also began to participate in the attack. Ms. Arwood, after having been severely beaten by both defendants, was ordered into the bathroom to clean up. When she refused to get into the tub, Sawyer gave her a karate kick to the chest whereupon she was knocked against the side wall of the tub and she fell into the tub. Lane then lifted her from the bathtub and undressed her. Sawyer went into the kitchen with Shano after he told Lane to watch the woman in order that she might not escape. Lane did so, closed the door and raped Arwood as she was lying semiconscious in the tub. About fifteen minutes later, after Sawyer became impatient as to what was taking Arwood so long to clean up, he proceeded into the bathroom with a coffee pot of scalding hot water and poured the same over the victim's head with some Tide detergent. Lane began dunking the woman's head under the water that was drawn into the tub and he also began punching her in the face. Sawyer yanked Ms. Arwood out of the tub by her hair, when she resisted Sawyer again gave her a karate kick into the chest causing the victim to smash her head on the wall next to the bathtub, never to regain consciousness.

She was then moved from the bathtub by Sawyer, who grabbed her by the scalp and Lane, who held her feet, and dropped her face down on the floor in the hallway. At this point, Sawyer began beating Ms. Arwood's nude body with

a thick belt while he was walking on her back; and Lane had begun kicking Ms. Arwood in the ribs. Finally, after repeated requests of Ms. Shano to leave Ms. Arwood alone, Ms. Arwood was dragged into the living room and placed on a sofa bed. While on the sofa bed, Ms. Arwood was once again raped by Charles Lane and subsequently set on fire by Sawyer during the course of Lane's act. The police arrived on the scene shortly thereafter upon the request of Mrs. Champagne, Shano's sister, who had arrived on the scene to relay a message to Ms. Shano about their mother.

Charles Lane was tried and found guilty of first degree murder and sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. On May 17, 1982, the Supreme Court affirmed the conviction and sentence of Charles Lane.

(14) State of Louisiana vs. Robert Sawyer
Docket No. 79-2841 Division "G"
Crime Convicted: First Degree Murder
Sentence: Death
***Sawyer v. Louisiana*, 104 S. Ct. 1719**
***Sawyer v. Louisiana*, 103 S. Ct. 1223**
***State v. Sawyer*, 422 So.2d 95**

Robert W. Sawyer was charged with the first degree murder of Frances Arwood, this crime occurring on September 28, 1979. After trial by jury, he was sentenced to death on September 19, 1980.

On October 18, 1982, the Supreme Court affirmed the conviction and sentence of Robert Sawyer. Defendant's conviction and sentence were affirmed by the U.S. Supreme Court, and in March of 1993, defendant was executed by lethal injection.

For a complete factual recitation of the case, please refer to the facts of the immediate preceding case of Charles Lane, No. (13).

In addition, the State would repectfully submit that three aggravating circumstances were found by the jury, to wit:

1. the defendant was engaged in the perpetration of aggravated arson;
2. the defendant had a prior conviction for an unrelated murder;
3. the offense was committed in an especially cruel manner.

(15) State of Louisiana vs. Tyronne Lindsey
Docket No. 80-200 Division "I"
Crime Convicted: First Degree Murder
Sentence: Death
***State v. Lindsey*, 428 So.2d 420 (La. 1983), 543 So.2d 886 (La. 1989);**
***Lindsey v King*, 769 F.2d 1034 (5th Cir. 1985)**

On the evening of December 19, 1979, at approximately 7:30 p.m., John Knoph and Steven Birks were preparing to exit the Oakwood Shopping Center located in Jefferson Parish. The two men had just exited the mall and were walking in the parking lot toward their car when they heard muffled screams behind them. Sensing that something was wrong, the men began walking back toward the mall. They isolated the direction of the scream to a narrow space between two parked cars. The passenger door on one of the cars was opened and facing them. As they watched, the head of a man, later identified as that of Tyronne Lindsey, popped up and was visible through the passenger door window. Suddenly, the man ducked down and ran toward the back of the car and then began running down the parking aisle. Then a woman, later identified as the victim, stood and ran from the same spot. Knoph, assuming the woman was not seriously injured, began running down the next aisle parallel to the man and Birks ran between parked cars to get into the same aisle as the man. The man then turned and pointed a pistol at Knoph. Knoph and Birks retired from the chase and the man escaped. When they returned to examine the woman, they discovered that she had been shot in the back.

The woman, Earline Kidner, died of a gunshot wound to the back on December 29, 1979. Based on a photographic lineup identification by Knoph, Lindsey was

arrested for murder. Edward Beckeridorf of the Jefferson Parish Sheriffs Office obtained a statement from Tyronne Lindsey in which he admitted his complicity in a scheme to rob Oakwood Shopping Center patrons but claimed that someone named "Sidney" shot Earline Kidner.

At trial, defendant presented an alibi defense, attempting to show that he was at his girlfriend's apartment on the evening of the murder.

On September 8, 1981, defendant's conviction was affirmed but the sentence was vacated and remanded for resentencing. On remand to the Twenty-Fourth Judicial District Court, Lindsey was again sentenced to death. On February 23, 1983, that sentenced was affirmed. The Supreme Court recently denied writs on defendant's state application for post-conviction relief. His federal habeas corpus petition has recently been stayed pending exhaustion of new claims in state court.

On August 13, 1985, the United States Court of Appeals for the Fifth Circuit reversed and remanded and ordered Lindsey a new trial. Lindsey was retried, found guilty as charged and sentenced to death. This sentence was affirmed by the Louisiana Supreme Court on May 1, 1989. On April 7, 2004, he was resentenced to life pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002).

(16) State of Louisiana vs. Kenneth Sharp
Docket No. 80-566 Division "H"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Sharp*, 418 So.2d 1344 (La. 1982)**

Kenneth Sharp, Jr., left his residence to watch the residence of Joseph G. Bobinger and Bernadine Bobinger, although he carefully parked quite a distance away. Because of a marital breakup, Betty Sharp and her children had taken up residence with her brother and sister-in law, the victims.

Eventually Sharp's surveillance led him to the bushes outside the victims' home. When Betty Sharp opened the door to allow her children to exit for a Mardi Gras parade, she spotted the defendant hiding in the bushes; he came to the door and then literally forced his way in. Like so many times in the past, the discussion turned to argument over the marital situation and the defendant became hostile and was asked to leave. Seeing the defendant's mounting rage and his refusal to leave, Betty Sharp went to summon the Bobinger's who were resting in their den. Upon struggling with the defendant, Betty Sharp had spotted a knife lying where the defendant had previously sat.

The Bobingers' attempt to get the defendant to leave resulted in the defendant stabbing them to death; Bernadine Bobinger first then Joseph Bobinger.

Police and emergency units arrived shortly thereafter. Betty Sharp named her husband Kenneth J. Sharp as the assailant and he was arrested outside a Time Saver store a short while later.

Kenneth Sharp was convicted of first degree murder and subsequently sentenced to life imprisonment. On July 2, 1982, the Supreme Court affirmed the conviction and sentence of Kenneth Sharp.

(17) State of Louisiana vs. William Tuckson
Docket No. 80-2132 Division "K"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Tuckson*, 414 So.2d 360 (La. 1982)**

In the early morning hours of July 13, 1980, defendant broke into a truck parked about two blocks from the apartment of his girlfriend's mother. He popped a small side window with a screwdriver to unlock the door. He then reached under the seat of the truck and found a pistol but did not check whether it was loaded or not. Defendant stole a ring, an eight track tape and a C.B. radio which he loosened with pliers. While still in the truck, he heard someone holler. Defendant then jumped from the truck as

James Johnson entered the truck. He ran around the front of the truck to scare Johnson. He saw Johnson leaning over as if reaching under the seat at which time defendant fired into the front driver's window of the truck. After shooting the gun, defendant picked up the goods which he had removed from the truck and ran to his girlfriend's mother's apartment. Once there, he undressed and fell asleep on the couch.

The police learned that William Tuckson had been seen running from the area shortly after the gunshot was heard. The police were led to the girlfriend's mother's apartment where they knocked on the door with a normal rap. They were freely admitted to the apartment where they found defendant sleeping on the couch. Defendant was advised that he was under investigation for the murder of Johnson and orally recited his rights. After defendant was handcuffed, he was taken to police headquarters, where he signed a waiver of rights form, declined the presence of a lawyer, and gave a taped inculpatory statement.

After defendant was removed from the apartment, the police obtained permission from the lessee, Gwendolyn Walker, to search. They retrieved the .38 caliber pistol, the screw driver, the pliers, and a man's ring. Defendant's clothing, which he put on to go to the police station, was later obtained as evidence.

On December 9, 1980, William Tuckson was found guilty of first degree murder and sentenced to life imprisonment. On May 17, 1982, the Supreme Court set aside the conviction of first degree murder and remanded for the entry of guilty of second degree murder. The sentence was affirmed.

(18) State of Louisiana vs. Jimmy Robinson
Docket No. 80-2360 Division "C"
Crime Convicted: First Degree Murder
Sentence: Death
Remanded, New Conviction: First Degree Murder
Remanded, New Sentence: Life without benefit of parole, probation or suspension of sentence
***State v. Robinson*, 421 So.2d 229 (La. 1982)**

On August 5, 1980, defendant and Keith Stewart knocked at the door of the apartment of Mrs. Joyce Waites, who managed an apartment complex. They told Mrs. Waites that they wanted to apply for a job, but they left when she advised that there were no positions available. Approximately thirty minutes later, Mrs. Waites answered another knock at the door and was confronted by the same two men, who drew guns and demanded money. When Mrs. Waites pointed to her purse, defendant placed a gun against her head and told her to lie on the floor.

Defendant held the gun to Mrs. Waites' head, while Stewart search [*sic*] the house for valuables. Mrs. Waites warned that her husband was coming home for lunch soon and begged them to leave, but they did not do so. When her husband arrived, defendant and Stewart used the gun to require him to lie on the floor next to Mrs. Waites. Defendant then made Mrs. Waites accompany him upstairs to search for more money. When they came back downstairs, defendant again told her to lie on the floor next to her husband.

Mrs. Waites told defendant that she could not stop shaking and asked for a cigarette, which defendant gave her. At defendant's instruction, she place [*sic*] her head on the floor and closed her eyes. When she heard a shot, she looked up and started screaming when she saw that her husband had been shot. Defendant placed the gun against her head and told her to shut up or she would be next. Shortly thereafter, defendant and Stewart left the apartment. They took the stolen money and fled in the Waites' car.

Mr. Waites died of a gunshot wound to the head. Later the same day, defendant was arrested and confessed to the shooting, but claimed that the gun went off accidentally. Defendant admitted, however, that the hammer of the gun was cocked prior to the shooting.

On August 22, 1980, a grand jury indictment was filed against defendants Jimmy Robinson and Keith Stewart for the first degree murder of Garland Waites, Jr.

On January 5, 1981, Jimmy Robinson was tried separately before a jury and found guilty as charged. On January 8, 1981, the jury recommended that the defendant be sentenced to death, finding the following aggravating circumstances:

1. the offender was engaged in the perpetration of aggravated burglary;

2. the offender has a significant prior history of criminal activity;

3. the offender knowingly created a risk of death or great bodily harm to more than one person;

4. the offense was committed in an especially heinous, atrocious or cruel manner;

5. the victim was an eyewitness to a crime alleged to have been committed by defendant.

On October 18 1982, the Supreme Court affirmed the conviction, but set aside the sentence, remanding the matter for the trial court to conduct a new sentencing hearing.

On remand the defendant was sentenced to life.

(19) State of Louisiana vs. Keith Stewart
Docket No. 80-2360 Division "C"
Crime Convicted: Second Degree murder
Sentence: Life
***State v. Stewart*, 437 So.2d 872 (La. 1983)**

Keith Stewart was indicted for first degree murder of Garland Waites. Stewart was tried separately before a jury and found guilty of second degree murder and sentenced to life imprisonment without benefit of parole, probation or suspension of sentence.

On September 2, 1983, Stewart's conviction and sentence were affirmed in a per curium opinion.

For a full detailed description, please see the facts recited immediately above in No. (18).

(20) State of Louisiana vs. Johnny Taylor
Docket No. 80-2388 Division "D"
Crime Convicted: First Degree Murder
Sentence: Death
***State v. Taylor*, 422 So.2d 109 (La. 1982)**

The victim, David Vogler, received a telephone call around 8:45 p.m. from a black male about an automobile which Vogler had placed for sale in the parking lot of Barker's in Kenner, Louisiana. Vogler left his home in his Cadillac to show the red 1976 Buick Regal to the inquirer. Around 12:45 a.m., Mrs. Vogler went to the parking lot in search of her husband along with her sister and her sister's boyfriend. The red Buick was missing; the Cadillac was parked in the lot. Mrs. Vogler looked in the Cadillac window and saw her husband's coat on the front seat. She saw two police cars stopped in the lot and asked the officers if they had seen the Buick. They assured her that they would be on the lookout for it. Mrs. Vogler then returned to her mother's house where she spent the night. At 9:00 o'clock the next morning she returned to the parking lot with her brother-in-law, Larry Huesman. Huesman looked inside the Cadillac and saw blood on the upholstery. Fearing foul play, Huesman dropped Mrs. Vogler off and called the

police. He met Officer Averett back at the parking lot and gave the officer Mrs. Vogler's extra set of keys. When Officer Averett opened the trunk, he saw the body of David Vogler. An autopsy revealed that David Vogler died from multiple stab wounds.

Defendant was subsequently arrested for an unrelated auto theft and incarcerated in Butler, Alabama. Two statements were given by Taylor; neither statement satisfactorily explained how the accused came into possession of the Buick Regal. The defendant's finger and palm prints were taken. These prints, along with those taken from the Cadillac, were sent to the FBI. The two sets of prints matched the partial palm print from the outside trunk lid based on forty points of identification. Sample of hair taken from defendant during the interview showed similar characteristics to the hair found in the Cadillac.

Johnny Taylor was charged with the first degree murder of David J. Vogler and was subsequently sentenced to death. On October 18, 1982, the Supreme Court affirmed the conviction arid sentence of Johnny Taylor. Johnny Taylor was executed February 29, 1984.

(21) State of Louisiana vs. Glenn M. Moore
Docket No. 80-2561 Division "C"
Crime Convicted: Second Degree Murder
Sentence: Life
***State v. Moore*, 412 So.2d 108 (La. 1982)**

The victim died as a result of a bullet wound in the left chest which severed the aorta of the heart causing Clarence Lanis to bleed to death in a matter of seconds. In addition, evidence was submitted indicating the defendant not only killed Clarence Lanis but he also shot Diane King, who was sitting in the car with Laths and who was wounded in the leg.

Diane King, the second target, testified that Moore was indeed the man who shot and killed the victim and also shot at her. She had known Moore prior to the shooting. She testified that Moore was standing by the passenger window

by the driver's side when he shot the deceased and then her in both legs. She further testified she had lived with the defendant from March until June, 1980.

Diane King also testified that Moore had telephoned prior to the trial and threatened her that he would kill her if she told the police that he did it. He offered her $1400.00. She described how Moore had laid in wait for the victim.

Glenn Moore was charged by grand jury indictment on September 19, 1980, for the first degree murder of Clarence R. Lanis. On January 21, 1981, Moore was found guilty of second degree murder and sentenced to serve life imprisonment without benefit of parole, probation, or suspension of sentence. Glenn Moore's conviction and sentence were affirmed by the Louisiana Supreme Court without opinion.

(22) State of Louisiana vs. James Smith
Docket No. 80-2995 Division "H"
Crime Convicted: Second Degree Murder
Sentence: Life
***State v. Smith*, 416 So.2d 1301 (La. 1982)**

On February 8, 1980, Mr. Kenneth Dabog was at home at approximately 11:20p.m. when a neighbor, Mr. Roger Allemand, telephoned him to say that someone was breaking into the home of another neighbor, Mr. Herman Hunter. Mr. Allemand instructed Mr. Dabog to meet Mr. Allemand at the neighboring house. Upon arriving, Mr. Dabog then heard Mr. Allemand yelling, "He ran out. He is coming out the back door." Mr. Dabog overheard a body fall against the Herman house. He also heard six to eight gunshots fired. Roger Allemand fell to the ground. Mr. Dabog shouted "come out," while holding a gun. The defendant, Henry James Smith, then came out, carrying a gun. The police were subsequently called and the defendant was arrested pursuant to a search warrant of his residence. Once the defendant was in custody and had been given his *Miranda* warnings, he gave a voluntary statement to police after having conferred with his step-father. This statement said that he shot at random during the breaking and

entering of Herman's home, after he himself had been shot. The defendant gave a voluntary statement to police after repeated *Miranda* warnings as well as opportunity to confer with his step-father, implicating himself in the breaking and entering of the home of Mr. Herman, as well as the shooting itself. There was ample testimony both at the Motion To Suppress as well as at trial that there was no coercion, threats or promises made to the defendant during questioning. Mr. Allemand subsequently died of a gunshot wound to the lung.

On October 31, 1980, Henry James Smith, 16, was charged with the first degree murder of Roger Allemand. On March 12, 1981, the defendant was found guilty of second degree murder and was sentenced to life imprisonment on April 16, 1981. On May 26, 1982, the Supreme Court affirmed his conviction and sentence.

(23) State of Louisiana vs. Sabrina Parks
Docket No. 80-3493 Division "C"
Crime Convicted: Second Degree Murder
Sentence: Life
***State v. Parks*, 422 So.2d 1164 (La. 1982)**

The facts reveal that defendant's husband, Jimmy Parks, had been working for Stone Oil Company. On December 25, 1980, he returned to Gretna and was paid. On the same day, defendant's lover, David Carbo, executed Jimmy Parks, took his paychecks from him and gave the checks to defendant, who cashed them the next day. Defendant and Carbo had an agreement that they would split the proceeds of any insurance policy on the victim. Testimony revealed that defendant fully assisted Carbo in the scheme to kill her husband. Jimmy Parks died as a result of a gunshot wound to the back of the head.

Following a three day trial by jury, defendant Sabrina Parks was convicted of second degree murder and, on June 5, 1981, defendant was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. On December 10, 1982, the Supreme Court affirmed the conviction and sentence of Sabrina Parks.

(24) State of Louisiana vs. David B. Carbo
Docket No. 80-3493 Division "C"
Crime Plead: Second Degree Murder
Sentence: Life

On October 26, David Carbo was charged with the first degree murder of Jimmy Parks. On June 5, 1981, defendant plead guilty to second degree murder and was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. He was a co-defendant with Sabrina Parks, above.

For a full detailed description, please see the facts recited immediately above in No. (23).

(25) State of Louisiana vs. Juan A. Dupiere
Docket No. 81-573 Division "M"
Crime Convicted: Second Degree Murder
Sentence: Life

Testimony reveals that defendant was at a party at the home of Joseph Mangerchine (who was indicted on first degree murder charges along with defendant), where a substantial quantity of alcohol and drugs were consumed. During the course of the evening, Juan Dupiere asked Joseph Mangerchine if he would assist him in committing an armed robbery, Mangerchine agreed, and even secured a gun for the purpose. Eventually the two ended up in Mangerchine's car on Jefferson Highway, and pulled into the Model Motel. At that point, defendant exited the car and went inside. Within seconds, according to the testimony of Mangerchine, Dupiere came running out, jumped into the car, and told Mangerchine that he had to shoot the manager inside the motel.

Testimony also revealed that the two left the scene, but returned a little later in a different car to see what was going on. Mangerchine went into the motel and found the victim dead on the floor. He then stole money from the cash register, picked up the gun, and we outside to make a phone call. Seeing a policeman across the street, he and defendant

went to tell him about the victim, alleging that they had come to get a room at the motel. Mangerchine and Dupiere gave statements to police at this time (December 22, 1980) each using the same story.

Later, on February 5, 1981, after further investigation, defendant was arrested by police. Defendant signed a waiver of rights form and gave a statement to police blaming the whole incident on Mangerchine.

Under indictment for first degree murder, the defendant was tried and onvicted unanimously of second degree murder on October 20, 1981. On September 9, 1982, the Supreme Court affirmed the conviction and sentence of defendant Juan Dupiere.

(26) State of Louisiana vs. Joseph Mangerchine
Docket No. 81-573 Division "M"
Crime Convicted: Manslaughter
Sentence: 21 Years

An indictment was filed against Joseph Mangerchine and co-defendant on February 20, 1981, charging them with the first degree murder of Theodore Martson. As a result of a plea bargain arrangement, Mangerchine pled guilty to manslaughter and armed robbery, and testified that the defendant Juan Dupiere actually was the person who shot the victim. On October 19, 1981, Joseph Mangerchine entered a plea to manslaughter and was sentenced to 21 years at hard labor.

For a full detailed description, please see the facts recited immediately above in No. (25).

(27) State of Louisiana vs. Herman Billiot
Docket No. 82-665 Division "H"
Crime Convicted: Second Degree Murder
Sentence: Life
***State v. Billiot*, 421 So.2d 864 (La. 1982)**

A homicide was committed by defendant Herman Billiot and his codefendant John O. Shilling. Through the

testimony of two female eyewitnesses, it was proven that Billiot, Shilling and another unidentified male were out on the town visiting various Gretna and Marrero nightspots. Late in the evening they met with Pamela LeBlanc at one of these nightspots and still later met with Stephanie (Penny) Plaisance at another nightspot. This group went to yet another bar where Ms. LeBlanc met the victim, James Stache. After they had all consumed some unknown quantity of beer, the party of six left in Shilling's automobile traveling towards Lafitte. The unidentified male passed out in the car and remained unconscious for the remainder of the night.

On the way to Lafitte, in the early predawn hours, Shilling stopped his automobile twice, presumably so he and the others could answer the call of nature. The first place he stopped was too well lit and there were too many people nearby watching another car on fire. Shilling then drove down the road a little further and stopped a second time. The victim, with the help of the defendants, got out of the car and walked about ten feet from the side of the vehicle. Billiot and Shilling began to beat and kick the victim, both pulling knives to cut and stab him. The defendants beat the victim senseless and robbed him of $30.00. Billiot and Shilling then returned to the others and drove away to Shilling's residence in Lafitte, leaving the victim for dead on the side of the road. Soon after arriving at this residence, Shilling and Billiot left the two women and returned to the scene of the initial attack to find Shilling's lost knife. When they arrived, they found the missing knife and the victim, still alive, trying to hitchhike.

The defendants put the victim into their automobile and drove a little further down the road to a more secluded spot. There they dragged the victim from the back seat and out to the edge of a bayou; each of them punching the victim in the throat, Billiot first, then Shilling, whereupon Shilling then slit the victim's throat with his knife; pushed his head under water and stood on him until the victim eventually drowned. The defendants returned to Shilling's residence to pick up the two women and take them home, telling them how they had finished oft the victim. Shilling also

threatened the women with death if they told anyone about the killing.

Herman Billiot was tried by a jury for the first degree murder of James Stache. Billiot was convicted of second degree murder and sentenced to life imprisonment. The Supreme Court affirmed Billiot's conviction and sentence on October 18, 1982.

(28) State of Louisiana vs. John 0. Shilling
Docket No. 81-665 Division "II"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Shilling*, 440 So.2d 110 (La. 1983)**

On July 27 and 28, 1981, John Shilling was tried for the first degree murder of James Stache. On July 29, 1981, he was convicted of first degree murder and on September 4, 1981, sentenced to life imprisonment. On October 17, 1983, the Louisiana Supreme Court affirmed defendant's conviction and sentence.

For a complete factual recitation, please see the facts related under No. (27) immediately above.

(29) State of Louisiana vs. Lane C. Nelson
Docket No. 81-3248 Division "A"
Crime Convicted: First Degree Murder
Sentence: Death
Remanded, New Conviction: Second Degree Murder
Remanded, New Sentence: Life without benefit of parole, probation or suspension of sentence
***State v. Nelson*, 459 So.2d 510 (La. 1984)**

A traffic accident occurred on Interstate 10 in Madison County, Florida. Lane C. Nelson was arrested for operating a motor vehicle under the influence of alcoholic beverages and taken to jail. In the course of doing his paperwork on the accident report, Trooper Melgaard engaged Nelson in general conversation and inquired about the ownership of the vehicle. Nelson said he had borrowed the rented

automobile from a friend in Louisiana to go to the store, and Trooper Melgaard suspected that the car might be stolen. During the course of the conversation Nelson volunteered: "Looking at me, you do not think I would kill anybody?" At this point, Trooper Melgaard broke off the conversation and summoned Officer William Pheil, who gave Nelson his *Miranda* rights. After those rights were fully explained and Nelson signed a waiver, the officer began to question him about his startling statement.

Nelson had been hitchhiking to New Orleans, when he was picked up by Beauvais Randall in Bankine, Louisiana. Randall, apparently a transvestite, was dressed like a woman. After Nelson told Randall that he had no money, Randall offered to pay Nelson for a photography session at Randall's apartment in New Orleans. Following an early morning arrival at Randall's apartment, the two men took a nap, and Randall showed Nelson magazine illustrations of women in bondage positions which he wished duplicated. Randall was trussed in ropes and Nelson took Polaroid photographs. During a break, Nelson received twenty dollars from Randall and purchased cigarettes, a pint of vodka, and two six packs of beer. Before Nelson left for the store, he retied Randall who performed oral sex on Nelson. Subsequently, there were approximately three hours of photography with Randall dressed in a woman's black slip and high heels. Randall then assumed men's clothes and the two went to a pizza parlor where Nelson drank beer. After they returned to Randall's apartment, Randall asked Nelson to tie him up again before Nelson left to do some laundry.

While doing the laundry, Nelson decided that he would leave in Randall's rented Mercury with Randall's money. When he announced his plan to Randall, the latter began to scream. Nelson then stabbed Randall repeatedly with an eight inch knife which had been in Randall's suitcase, took sixty-five or seventy dollars from Randall's jeans, and drove off in the Mercury. He intended to drive to Florida but went west instead of east and spent the night at a rest stop about one hundred miles from New Orleans, Nelson then retraced his steps to New Orleans and continued onto Florida where he picked up hitchhiker Wilhelm. Nelson told Wilhelm

about what had happened to Randall because he "had to tell someone."

Lane C. Nelson was indicted, tried and found guilty of first degree murder and the jury recommended a sentence of death, finding as the aggravating circumstance that Nelson committed murder while engaged in the perpetration of an armed robbery. His conviction and sentence were affirmed on appeal on October 15, 1984. Defendant's application in state court for post-conviction relief was denied. Prior to Nelson's death sentence being carried out, his conviction was reversed and the matter remanded for retrial. He was subsequently convicted of second degree murder and given a sentence of life in prison without benefit of parole, probation or suspension of sentence.

(30) State of Louisiana vs. Louis J. Cruz
Docket No. 81-3523 Division "K"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Cruz*, 455 So.2d 1551 (La. 1984)**

The badly decomposed body of twenty-two year old Susan Todorov was discovered floating in the Mississippi River in Jefferson Parish near Gretna. The body, clad only in a bra and blouse, was found about 30 feet from shore near a barge dock and other property owned by the J.W. Stone Oil Company. On the batture, between the levee and the water's edge, were a pair of underpants, a shoe, a matchbook from Gatsby's Lounge and a pack of Winston cigarettes, Cruz's brand. On a wharf nearby, there was a woman's silver chain minus its diamond pendant. Police observed footprints and drag marks, four to five feet down to the river. The clothing, shoe, and chain were identified as Todorov's; a set of diamond earrings and a watch she was wearing when last seen were missing.

Todorov was last seen alive leaving Gatsby's Lounge in Gretna with Louis Cruz, the defendant, on the evening of July 19. There was evidence that Todorov, Jo Alice Fitzhenry and Luis Crux were smoking marijuana that evening. Jo Alice, Todorov and defendant went to

Todorov's fiancé's Trans Am together and Jo Alice put her brown purse, containing her wallet and house keys, under the passenger seat in the front of the car.

A Jefferson Parish detective, Officer Rees, saw Todorov, Jo Alice and Cruz standing by the Trans Am outside Gatsby's at about two in the morning. Later, Todorov left the lounge and Cruz walked out behind her. Officer Rees testified that Todorov and Cruz got into the orange Trans Am and drove away.

Cruz was next seen at 6:00 a.m. at the Sahara Lounge in Belle Chasse. A barmaid recognized him when she reported for work and also noticed an orange Trans Am parked nearby. Michael Bellamy testified that he saw Cruz about 9:00 a.m. in Belle Chasse when Cruz gave Bellamy a ride in an orange Trans Am, which he claimed was a "company" car. Sometime during the ride, Bellamy noticed an object under his feet which he found to be a brown lady's purse that had come from under the passenger's seat.

Later that day, credit card purchases were recorded in Gretna, Biloxi and Pascagoula on the accounts of both Susan Todorov and her fiancé. The manager of a shoe store in Biloxi recalled the sale. He picked out defendant's photograph from a line-up and made a positive in-court identification of Cruz as the man who had used the credit card.

Between 10.30 and 11 p.m. on the evening of Thursday, August 20, Jo Alice was at home putting her child to bed when she heard a noise. She looked up and saw Cruz standing outside at an opened unscreened window. He shook a set of keys, which she recognized as her own, and told her, "I'm going to kill you like I killed her." Jo Alice saw an orange Trans Am parked outside. She screamed and ran into the room where her sister and brother-in-law were sleeping. When Jo Alice returned with her brother-in-law to the window where she had seen Cruz, both he and the Trans Am were gone.

Officer Dunn and a New Orleans detective arrested Cruz and charge him with the murder of Susan Todorov. Cruz was tried and found guilty as charged. The jury was unable to reach a verdict at the sentencing hearing and Cruz was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The case was remanded to the trial court for consideration of Cruz's Motion for New Trial based on alleged new evidence. A hearing on the new trial was heard and denied in district court. Cruz's conviction and sentence were affirmed.

(31) State of Louisiana vs. James Flowers
Docket No. 81-3950 Division "J"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Flowers*, 509 So.2d 588**
(La. App. 5 Cir. 1987)

A seventy year old widow who lived alone was brutally murdered in her home. The physical evidence indicated that she had been severely beaten, strangled and raped during a burglary. The assailant had broken a window and ransacked the house. Whether any of her property had been taken could not be determined immediately, however.

The next day an anonymous caller telephoned the Gretna Police Department and furnished information linking the defendant with the murder. According to the officer, the tip was to the effect that James Flowers, a black male, could be found in the area of Jefferson and Hamilton Streets driving a small white Chevette-type car containing one black male passenger and something taken from "that lady that was murdered on Jefferson Street yesterday."

At trial Flowers stated that he never entered the victim's home and that his participation in the crime was limited to helping the sixteen year old codefendant gain entrance into the home. The victim's screams caused the two defendants to seek shelter along a nearby railroad track, where approximately eighty dollars was divided. Flowers stated that he and his codefendant parted company with Flowers

returning to his home as the codefendant returned to the victim's house. Within thirty minutes the two were reunited along the railroad tracks and at this point, according to Flowers' statement, the jewelry which Officer Michel seized had been given to Flowers for safe-keeping.

The victim had extensive patterned abrasions and markings around her neck which matched the pattern in the soles of James Flowers' tennis shoes. The victim's jaw was broken, her teeth were knocked loose, and she had several broken ribs. The victim also suffered a massive hemorrhage to the neck. The autopsy report stated that death resulted from a subdural hematoma which in turn was a result of the severe trauma to her head.

Sherry Kirkland, a forensic biologist for the Jefferson Parish Sheriffs Office, stated that as a result of blood and vaginal swab tests, it was determined that Mrs. Malmstrom was raped by a person with type "0" blood. Furthermore, Flowers and Grant both had type "0" blood.

A true bill of indictment was returned against Flowers for the first degree murder of Madeline Malmstrom. Olin Grant's indictment was later amended to the charge of manslaughter. Flowers was found guilty of first degree murder with a recommendation for the death penalty by the jury. That conviction and sentence were affirmed on appeal.

On January 8, 1986, the United State Fifth Circuit Court of Appeal remanded the case for new trial. On August 1, 1986, defendant was found guilty of first degree murder and sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. That sentence and conviction were affirmed on May 1, 1987.

(32) State of Louisiana vs. Robert Lee Butler
Docket No. 82-2184 Division "C"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Butler*, 462 So.2d 1280**
(La. App. 5 Cir. 1985)

During the early morning hours of May 29, 1982, both David Cruz, the man who was fatally shot that night, and Robert Butler, the accused in this case, happened to park their separate cars in the lot outside the Four Palms Lounge on David Drive in Metairie and to enter the nightclub. Cruz apparently went to the Four Palms Lounge to greet his friend Sal Soleto, who was playing in the band there. Robert Butler, it seems, just stopped by for a drink.

Robert Butler, who was prone to homicidal, irrational rages, became furious because the bartender of the Four Palms Lounge, Deborah Revere, was drinking with a customer and so failed to serve Butler his drink as promptly as he wanted. Butler cursed and verbally abused the bartender, threatening to have the lounge closed down that very night, and Ms. Revere referred him to the owner of the lounge, Mitchell Beard. When Beard heard Butler's enraged curses and threats he simply shrugged and told the accused to do whatever he thought was necessary. Madder than ever, Butler abruptly walked out of the lounge.

Mitchell Beard and Sal Soleto, who were curious as to what Butler would do when he left the lounge, followed the accused out and stood at the entrance to see what would happen. They watched Butler go to the trunk of his white car, take out a gun, and then get in his car. While this was happening David Cruz, having finished his chat with Sal Soleto, walked out of the lounge and across the parking lot to his own car. Keith Landry, who had just come to the lounge and was getting some cigarettes out of his vehicle, saw Butler say something to Cruz, whereupon Cruz turned and exclaimed to Landry, "This guy is going to shoot me." Then, while Beard, Soleto, and Landry watched in horror and disbelief, they heard a shot. Cruz staggered, called out, "He shot me," and fell to the ground mortally wounded.

Beard and Soleto got Butler's license number, and as he sped out of the parking lot the accused fired three more shots, one of which struck the maintenance man, Fred Jeffries, in the leg.

Defendant was found guilty of first degree murder and was sentenced to life imprisonment. Defendant Butler's conviction and sentence were affirmed on appeal January 14, 1985.

(33) State of Louisiana vs. Leslie Lowenfield
Docket No. 82-3478 Division "N"
Crime Convicted: First Degree Murder (3 counts); Manslaughter (2 counts)
Sentence: Death (3 sentences); two sentences of 21 years to run consecutively on manslaughter convictions.
***Lowenfield v. Louisiana*, 107 S. Ct. 13**
***State v. Lowenfield*, 495 So.2d 1245**

On August 13, 1982, Sheila Thomas, her daughter, Thomas' parents and Thomas' boyfriend were shot to death in the kitchen of the home Thomas had been sharing with her parents. Several State witnesses testified that a romantic relationship between Thomas and defendant had come to an unhappy end some months before the crime. Several witnesses testified that defendant had continuously threatened and harassed Thomas after the breakup; one witness testified to threats made by defendant on the evening before the murders. Another witness testified that defendant had admitted to the killings in a telephone conversation. Certain physical evidence linking defendant to the crime was seized from defendant's apartment: among other items, the murder weapons were found in defendant's apartment.

Defendant himself testified and presented an alibi defense: defendant testified that he had been in Florida on the day the crime occurred.

At the sentencing hearing the State offered evidence that defendant had one previous conviction. The state also offered evidence that Thomas had filed criminal charges against defendant shortly before the crime occurred.

The three sentences of death imposed on defendant were supported by the aggravating circumstance that defendant intentionally created a risk of death or great bodily harm to more than one person.

Lowenfeld was indicted, tried and found guilty. On December 2, 1985, the Louisiana Supreme Court affirmed defendant's convictions and sentences. Lowenfield's conviction and sentence were affirmed by the U.S. Supreme Court on January 13, 1988. Lowenfield was subsequently executed in the electric chair.

(34) State of Louisiana vs. David M. Patterson
Docket No. 83-2502 Division "J"
Crime Convicted: Second Degree Murder
Sentence: Life
***State v. Patterson*, 464 So.2d 811**
(La. App. 5 Cir. 1985)

The evidence at the trial revealed that the victim left her home in Texas on June 30, 1983, for the purpose of traveling to New Orleans to visit her son. Somewhere along the way, the victim picked up Patterson and McFall, who were hitchhiking to Florida. The trio drank beer en route to the victim's destination.

The victim exited Interstate Highway 10 to make a phone call. Upon completing the call, she agreed to drive the hitchhikers back to the Interstate. As the victim was driving back to the Interstate, one of the hitchhikers, later identified as Patterson, pulled out a knife, held it against the victim's throat and told her he was going to take her car. The victim stopped the car in the roadway and attempted to escape. However, she was prevented from doing so by Patterson who grabbed her arm as she got out of the car. As Patterson held her, McFall then stabbed the victim with a knife eight times. There is some medical evidence indicating

the victim may have been stabbed with two different knives. The victim was able to break free and run a short distance from the car before collapsing. Patterson and McFall then placed the victim back in the car.

David Patterson was indicted for first degree murder. On January 12, 1984, Patterson was found guilty of second degree murder and sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. On February 11, 1985, Patterson's conviction and sentence were affirmed. Defendant's federal habeas corpus application was denied.

(35) State of Louisiana vs. Roy McFall
Docket No. 83-2502 Division "K"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. McFall*, 464 So.2d 845 (La. App. 5 Cir. 1985)**

Roy McFall was indicted for the first degree murder of Theresa Diane Power. He was tried by a twelve person jury and found guilty as charged to life imprisonment without benefit of parole, probation of suspension of sentence. On February 11, 1985, defendant's conviction and sentence were affirmed.

For a full description, please see the facts recited immediately above in No. (34).

(36) State of Louisiana vs. Daniel Washington
Docket No. 83-2867 Division "F"
Crime Convicted: Second Degree Murder
Sentence: Life

Daniel Washington, the defendant, Larry Stevenson, and two other men were gambling during the early morning of August 30, 1983. Wardell Elliot saw the dice game on his way to the grocery store. When Elliot returned from the store, he stopped to watch until the game broke up. Elliot returned to his apartment.

In the meantime, at approximately 9:45 or 10:00, Jacqueline Lackey, who lived with Elliot, heard an argument outside. Lackey looked out and observed Washington, Stevenson, another male, and Langella Benefield, Washington's girlfriend. Washington and Stevenson were arguing because Washington wanted the money that he had lost in the dice game returned. Lackey observed Washington threaten Stevenson with a gun and heard Benefield saying, "Shoot him, Danny. Shoot him." Lackey saw Washington shoot Stevenson, take money from Stevenson's pocket, and give the money to Benefield who then fled. Lackey woke Elliot who went to the window. Elliot observed Washington getting up from Stevenson's body with a gun in his right hand and an unidentifiable object in his left.

Washington testified and presented witnesses who stated that he left the dice game, argued with Benefield, and left for his sister's house. His sister verified that Washington was at her home shortly before 9:00 a.m. However, his sister left the house at approximately 9:30 or 9:45 and she could not verify whether or not Washington remained in the house.

Washington also testified that he only lost $200.00 of his own money and $110.00 which he borrowed from Benefield. Washington also denied shooting Stevenson. However, Elliot testified that Washington admitted losing $1,100.00 or $1,200.00 to Stevenson. Furthermore, Benefield testified that she did not loan Washington money, that he lost about $1,500.00, and that she saw him shoot Stevenson. Benefield admitted going to the defense attorney's office two days after the crime and confessing to the murder and she also admitted to hiding the gun after Washington gave it to her.

On October 7, 1983, Washington was indicted for first degree murder. On May 16, 1984, the jury returned a verdict of guilty of second degree murder and defendant was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence.

(37) State of Louisiana vs. Charles E. Dean, Jr.
Docket No. 84-2151 Division "N"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Dean*, 487 So.2d 709 (La. App. 5 Cir. 1986)**

On the night of July 10, 1984, Charles Dean had a few drinks, and sniffed a quantity of cocaine. Then, sometime after midnight, on July 11, 1984, he placed about a dozen guns, plenty of ammunition, some cocaine, and some clothes in his car and drove to the house at 509 Marguerite Drive, Metairie, where his mother, Harriet Dean, and his sister Janice Dean, were living. Dean shot his mother at close range between the eyes, execution style, and then shot his sister Janice in the back of the head, apparently as she was trying to flee. Dean then departed, leaving the kitchen, where his mother's body was found. Also found were cocaine paraphernalia consisting of plastic bags, straws, and funnels. He drove around the metropolitan area for a few hours. Around six o'clock that morning, coming out of a steep curve, he crashed his car into the front of the house of Ms. Linda Stinson, where he was found and subdued by Louisiana State Troopers and a New Orleans police officer, whom he startled when he exclaimed, "No one can help me now. I just killed my mother and sister."

Defendant was charged by grand jury indictment with two counts of first degree murder. Prior to trial, count two was severed by the State and defendant proceeded to trial by jury. He was found guilty as charged and the jury recommended a sentence of life imprisonment without benefit of parole, probation, or suspension of sentence. On April 14, 1986, defendant's conviction and sentence were affirmed.

(38) State of Louisiana vs. Samuel Rollins
Docket No. 84-2702 Division "H"
Crime Convicted: Second Degree Murder
Sentence: Life

Paula Camardelle and Darren Beauregard, who were living in the same apartment with Fernando Arboleda and

others on the date of the slaying, testified that on the afternoon of August 29, 1984, two black men came to the apartment to ask Arboleda about marijuana. Although Paula, during the present trial, identified Samuel Rollins as the gunman, she was not positive of her identification of Rollins and admitted that at a photographic lineup. Following the present offense she had positively identified another person as the gunman. At the photographic lineup which the investigating officer later displayed to him, Beauregard was able to identify Stanley Veal's picture as representing the robber who was not armed and who went back to the kitchen, but was unable to identify Rollins' photograph. However, Beauregard made a positive in-court identification of Rollins as the person who fatally shot Arboleda.

Beverly Williams testified that she knew Fernando Arboleda. She was also acquainted with Stanley Veal and Samuel Rollins, known to her as Poppa. Ms. Williams saw Stanley Veal, who told her not to tell on her, and also saw Samuel Rollins, who called her while she was standing on her porch, came over, and said, "I know you're not going to tell." When the witness asked Rollins why he did it, the accused contended that Arboleda had pulled a gun on him first. Ms. Williams positively identified Samuel Rollins as the person about whom she had been speaking.

Stanley Veal testified that on the afternoon of August 29, 1984, he, James Sims, and Samuel Rollins drove to Fernando Arboleda's residence to get some weed. While Sims stayed in the car, Veal and Rollins went to Arboleda's apartment, knocked on the door, and when Arboleda opened it, pushed their way in. Rollins pulled out a gun, and Veal, as instructed by the accused, went back to the kitchen to look for weed, which he was unable to find. He saw Rollins and Arboleda arguing and wrestling. When Rollins started shooting, Veal ran out of the apartment, and as he fled he heard more shots. He got in the car with Sims, as did Rollins, and they drove off. Veal noticed that Rollins had blood all over his shirt and hands, and that he had a gun in his shirt. Rollins said, "I killed him, I had to shoot him, Bra. I had to shoot him. He got what the fuck he

deserved. I had to kill him." Then Veal identified the accused as the man who shot Arboleda.

James Sims, known as Barry, had also originally been charged with the murder of Fernando Arboleda, but had, like Veal, cooperated with the State, and had been allowed to plead guilty to accessary [*sic*] after the fact to the present armed robbery.

Samuel Rollins was found guilty of second degree murder and sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. His sentence was affirmed on appeal December 16, 1985.

(39) State of Louisiana vs. Thomas Medford
Docket No. 84-2705 Division "J"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Medford*, 489 So.2d 957**
(La. App. 5 Cir. 1986)

Thomas Medford and Kenneth McCullough forced their way at gunpoint into the home of George and Arlynn Plaisance and their two children. A neighbor, Albert Alonzo, and his son Marty came to the aid of the Plaisance family. During a struggle Medford fired three shots at Marty, missing, and shot Albert Alonzo in the forearm and hip. When Marty pinned Medford, McCullough came to Medford's aid and shot Marty in the shoulder and Albert in the head. McCullough and Medford then fled the Plaisance home.

Albert Alonso died as a result of the gunshot wound to the head. Without a doubt, Medford's actions evidenced a specific intent to kill or inflict great bodily harm upon more than one person.

Medford was indicted for first degree murder and on June 28, 1985, the jury returned a verdict of guilty as charged. Defendant was sentenced to life imprisonment without benefit of parole, probation, or suspension of

sentence. On May 12, 1986, defendant's conviction and sentence were affirmed.

(40) State of Louisiana vs. Kenneth McCullough
Docket No. 84-2705 Division "S"
Crime Convicted: First Degree Murder
Sentence: Life

Kenneth McCullough was indicted along with his co-defendant Thomas Medford for first degree murder. On May 20, 1989, McCullough was found guilty as charged. He was sentenced to life without benefit of parole, probation, or suspension of sentence.

For a full description, please see the facts recited immediately above in No. (39).

(41) State of Louisiana vs. Carolyn Moore
Docket No. 85-1 47 Division "C"
Crime Convicted: Second Degree Murder (two counts)
Sentence: Life (two consecutive terms)
***Slate v. Moor*, 498 So.2d 82 (La. App. 5 Cir. 1986)**

Mark Miller and Carolyn Moore had driven around the Westbank area searching for a place of business to rob when they decided on the Lapalco Boulevard Allstate office as a safe target. After the defendants had gained entrance to the office, both victims were robbed of cash and jewelry; it was defendant Miller who shot each victim twice as defendant Moore exited the Allstate office to start the couple's car.

Miller and Moore were arrested and charged by the Jefferson Parish Grand Jury with the first degree murders of Wilbert Laiche and Jack Couret during the course of an armed robbery. The cases were severed for trial and on November 14, 1985, Carolyn Moore was tried and found guilty on an amended indictment of two counts of second degree murder and sentenced to serve two life terms to run consecutively without benefit of probation, parole, or suspension of sentence. Moore's sentence was affirmed on appeal November 10, 1986.

(42) State of Louisiana vs. Mark W. Miller
Docket No. 85-147 Division "D"
Crime Plead: Second Degree Murder (2 counts)
Sentence: Life (two consecutive counts)

Mark Wayne Miller was indicted with two counts of first degree murder during the course of an armed robbery. On August 19, 1985, Miller pleaded guilty to both counts of first degree murder and was sentenced to two consecutive life terms.

For a full description, please see the facts recited immediately above in No. (41).

(43) State of Louisiana vs. Glen Keith Weiland
Docket No. 85-380 Division "L"
Crime Convicted: First Degree Murder
Sentence: Death
Remanded, New Conviction: Manslaughter
Remanded, New Sentence: 21 Years At Hard Labor
***State v. Weiland*, 562 So.2d 950**

On October 28, 1985, Glen Weiland beat up one of the victims, Ida Boudoin, his girlfriend. On October 29, 1985, as Ida Boudoin and Paul Sahuque, Ida's former husband, were walking across a parking lot, the defendant jumped out and stabbed her seven times with a bayonet. He also stabbed Paul Sahuque at that time. Ida Boudoin died in the ambulance on the way to the hospital and Paul Sahuque was placed in intensive care.

On November 14, 1985, Glen Weiland was charged by grand jury indictment with first degree murder. The defendant was tried by jury and was found guilty as charged. On June 13, 1986, the jury sentenced the defendant to death. The jury found one aggravating circumstance under La. C.Cr.P. art. 905.4: that the offender knowingly created a risk of death or great bodily harm to more than one person. The mitigating circumstances presented at trial were as follows: no significant prior

history of criminal conduct, emotional distress from his girlfriend's infidelity, the intoxicated state of the defendant which led to increased emotional distress, and that the murder was neither cruel nor vicious.

On April 6, 1987, the Louisiana Supreme Court reversed Weiland's first degree murder conviction and on May 7, 1987, the State's rehearing was denied. On retrial, the State amended the indictment to second degree murder. After jury trial, the defendant was convicted of manslaughter and sentenced to twenty-one years at hard labor. The sentence and conviction were affirmed on May 16, 1990.

(44) State of Louisiana vs. Ralph Deer, Jr.
Docket No. 86-2005 Division "A"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Deer*, 519 So.2d 271 (La. App. 5 Cir. 1988)**

Ralph Deer. Jr., on June 28, 1986, committed an armed robbery of a store clerk at a Time Saver Store "to get a little extra money." He committed the robber [*sic*] with a twelve gauge shotgun. He entered the store with trigger cocked and pointed the gun at the clerk's head. The clerk was shot in the head and died. Deer, according to a friend who drove them away, said that Deer seemed upset that he shot the clerk for eleven dollars. Deer testified that he shot the clerk but that the gun discharged accidentally. He was tried on a plea of not guilty and not guilty by reason of insanity. He was convicted of first degree murder but the jury was unable to unanimously agree on a sentence. Thus, a life sentence was imposed.

(45) State of Louisiana vs. Robert Tassin
Docket No. 86-3579 Division "B"
Crime Convicted: First Degree Murder
Sentence: Death
***State v. Tassin*, 536 So.2d 402**

Around five-thirty or six o'clock on the afternoon of November 5, 1986, tugboat captain Edward Martin and his friend and deckhand Alvia Wayne Stagner received their

paychecks at the Harmony Street Wharf in New Orleans, drove over the bridge to Schnell's restaurant and bar on the Westbank, and cashed their paychecks. They proceeded to the nearby Shady Lady Lounge, where for several hours they drank beer, played pool and quarters, and talked to a lady named Sheila Mills.

When Eddie Martin and Wayne Stagner were leaving the Shady Lady Lounge in Martin's Thunderbird, Sheila Mills came up and asked Martin if he wanted to buy some cocaine. Martin said yes, and let Sheila Mills get in the front seat between him and Stagner.

After stopping by a bar to look for drugs without success, Martin, at Sheila's direction, drove to the house of Robert and Georgina Tassin at 529 Larossini in Westwego. While the two men waited in Martin's car, Sheila went in the Tassin residence. After a while she came back with Robert and Georgina Tassin, whom she introduced to Martin and Stagner.

The Tassins did not have any cocaine, but would try to get some. They climbed in the back seat of the Thunderbird, Robert Tassin sitting directly behind Eddie Martin. Sheila said they should go to the TresVidas Apartments. When they arrived there, the Tassins and Sheila went in and came back to report that "the guy wasn't there, that he was back at the Tassin's house." As a matter of fact, Robert Tassin had gotten a gun from a friend of his, Darryl Macaluso, who lived there.

It was now around midnight. They started back to the Tassin's house. Right before the Lapalco bridge, Sheila asked Martin to pull over because she felt sick and wanted to get out of the car. She directed Martin off the road and under the bridge. Sheila, under a prearranged plan, then got out, ostensibly to be sick, leaving Martin and Stagner in the front seat of the car and the Tassins in the back.

Suddenly, as Stagner reached for his cigarettes on the dashboard, he saw a red flash and felt a sting as a bullet came through his back and lodged in his left lung. Stagner

turned, looked over his left shoulder, and saw Robert Tassin shoot Eddie Martin three times in the back of his head and neck.

Stagner immediately opened the car door and jumped out, and as he did so Robert Tassin shot Stagner in the left leg. Stagner, his leg bleeding badly, and blood on his shirt, managed to run by Sheila Mills, who was standing behind the car, and up to the end of the Lapalco bridge. The traffic light was red. Stagner made it to the center of the road, where he sat down. A car came by with a flat tire, and Stagner asked the occupants to call the police, saying that he had been shot, and that the captain of his tugboat had also been shot and might be dead. Then Stagner passed out.

He was taken to West Jefferson Hospital, placed in intensive care, and treated for his wounds, which, though very serious, were not fatal. A day or so later Stagner gave a statement to the police officers who were investigating the incident, and, riding in an ambulance, directed them to the Tassins' home.

Meanwhile, the Tassins and Sheila Mills pulled Eddie Martin's body out of the car. After checking it for money, they left the body in a ditch near the Lapalco bridge. They next ran Martin's Thunderbird into Bayou Signette, also known as the Westwego Canal, which was opposite the Tassins' house, and went into hiding. When Robert Tassin realized that Wayne Stagner was recovering from his wounds, Tassin turned himself in.

Robert Tassin, his wife Georgina, and Sheila Mills were indicted by the Jefferson Parish Grand Jury for the first degree murder of Edward Martin during the commission of an armed robbery. The indictment was later amended so as to charge only armed robbery in the case of Georgina Tassin and Sheila-Mills, and they were severed from this case.

Robert Tassin was tried, found guilty of first degree murder, and sentenced to death. His conviction and sentence were affirmed by the Supreme Court on December

12, 1988. Defendant has a writ application pending in this court.

(46) State of Louisiana vs. Julius Martin
Docket No. 87-1382 Division "D"
Crime Convicted: Manslaughter
Sentence: 21 Years
***State v. Martin*, 566 So.2d 987**

Julius Martin was tried in the 24th Judicial District Court for first degree murder in April, 1988. The jury unanimously returned a lesser, responsive verdict: guilty of manslaughter. Martin was sentenced to 21 years.

The victim, Carl Williams, was tied up, doused with gasoline and set on fire on December 19, 1987. He died 10 days later of pneumonia.

(47) State of Louisiana vs. Jerrald Wilson
Docket No. 87-1286 Division "C"
Crime Convicted: First Degree Murder (two counts)
Sentence: Life (two counts)
***State v. Wilson*, 631 So.2d 1213**

Sometime during the night and early morning hours of March 30 and 31, 1987, defendant Jerrald Wilson and Tom Gormin left the River Ridge Bar and returned to the home Gormin shared with his mother. On March 31, 1987, Wilson drove to Baton Rouge and New Iberia in Gormin's vehicle. About noon on March 31 the police found the bodies of Tom Gormin and his mother, Joan Gormin, in their home in River Ridge. Tom had been stabbed numerous times and was found in the kitchen. He was clad only in his briefs. A shirt containing spots of the defendant's blood covered Tom's face. Joan Gonnin had been strangled and stabbed. A "T"-shaped incision was carved in her abdomen. Her body was found clad in night clothes in a spare bedroom. Evidence showed that a footprint that matched the defendant's tennis shoe was found in some of the blood covering the floor of the house. Pubic hair matching the defendant's was found in two bedrooms,

including the one in which Mrs. Gormin's body was found. Large butcher knives were found in the kitchen sink.

Defendant testified that he was a dancer and a male prostitute. He stated that he had been hired by Tom Gormin to perform oral sex in exchange for $20.00. Defendant testified that he and Gormin went back to Gormin's house and that he fell asleep after the sexual encounter. Wilson claimed to have been awakened by Tom Gormin standing over him with a butcher knife. Wilson claimed that he and Gormin wrestled over the knife and that he got the knife away from Gormin. Wilson testified that he stabbed Tom in the neck. Wilson further testified that he and Tom continued to fight, during which time Wilson stabbed Tom numerous times with several knives. The defendant denied any knowledge of how Mrs. Gormin died. He stated he found her body after killing Tom and checked to see if she was still alive. He then fled in Tom's vehicle and was arrested in New Iberia.

Defendant was convicted of two counts of first degree murder for the murders of Tom and Joan Gormin. Defendant was sentenced to two life sentences for these crimes. On November 4, 1994, the Supreme Court affirmed defendant's conviction and sentence.

(48) State of Louisiana vs. Richard Powell
Docket No. 89-1283 Division "M"
Crime Convicted: Manslaughter
Sentence: 21 years

On November 7, 1982, Edna Zalaya was raped and murdered in her Jefferson Parish apartment. On April 6, 1989, Vernon Williams was indicted for the first degree murder of Edna Zalaya. Also indicted was Richard Powell, who later pled guilty to manslaughter and testified for the State. At trial, Powell testified that he was in Williams' presence and watched Williams on the night of November 7, 1982, as Williams raped and murdered the victim. Powell, who had once been found incompetent to proceed, testified as to the medication he was taking during the trial.

Several doctors testified regarding Powell's mental condition.

Various pieces of evidence were taken from the crime scene, including sperm recovered from the victim's anus, pantyhose, and some towels. The sperm found in the victim's anus was found to have the same DNA as the defendant Williams. The sperm on the pantyhose and towels did not match Williams, Powell, or the victim's boyfriend. Several witnesses testified at trial that they remembered seeing Williams and Powell together during the fall of 1982. A neighbor of the victim testified that she heard a black male voice in the victim's apartment on the night of the murder. Another neighbor testified that she had seen a black man leaving the victim's apartment the night of the murder, although she could not identify Williams as that man.

On November 21, 1991, Williams was tried by jury and convicted of first degree murder. The jury recommended a life sentence. A motion for new trial was filed by the defense and granted by the trial judge. The State thereafter filed a motion to recuse the judge, which was denied by the court. A motion to reconsider was also denied.

The State sought writs from the Fifth Circuit Court of Appeal, which were granted. The Fifth Circuit remanded the case for a random allotment of the motion to recuse. The hearing on the motion to recuse was held and the motion was granted; on the same day, however, the Supreme Court granted defendant's writ, reversed the Fifth Circuit, and reinstated the trial court's denial of the motion to recuse. The State's application for rehearing was denied.

The State thereafter set the case for trial. Williams filed a motion to quash based on prescription, which the trial court granted. The State appealed that ruling and the Fifth Circuit affirmed. On June 3, 1994, the Supreme Court denied the State's application for supervisory writs. The case against Williams was subsequently thrown out.

Powell was indicted for the first degree murder of Edna Zalaya. The charges were later reduced to manslaughter and the defendant pled guilty.

(49) State of Louisiana vs. Bernis Brown
Docket No. 90-3893 Division "E"
Crime Convicted: First Degree Murder (2 counts)
Sentence: Life without benefit of parole, probation or suspension of sentence on each count to run concurrently.

On August 20, 1990, Bernis Brown shot and killed Isaac Edward Lilley and Danny Dugas while perpetrating an armed robbery of both men. The incident occurred outside Guy's Cue Club on Westbank Expressway.

Brown was drinking with friends and decided to steal a vehicle. He saw two men standing outside Guy's Cue Club leaning on a truck and approached them. He asked one for a ride and was told no. Brown then demanded the keys to the truck to which he was met with angry commands to leave. Brown then pulled out his .38 special and shot both men. He then removed the keys to the truck from one of the fallen men and took the truck.

Mr. Brown was later picked up by police, read his rights and gave a full confession. He pled guilty to two counts of first degree murder. He was properly Boykinized on the record. He received life without benefit of parole, probation, or suspension of sentence on each count to run concurrently. Mr. Brown has since filed a pro se appeal.

(50) State of Louisiana vs. Brian Bibb
Docket No. 91-2875 Division "D"
Crime Convicted: First Degree Murder (2 counts)
Attempted First Degree Murder
Sentence: Life (2 counts)
***State v. Bibb*, 626 So.2d 913**

In the early morning hours of June 3, 1991, Sandra Bibb slept. She was awakened by the attempts of her husband to kill her by stabbing and cutting her with a knife. Just before

the attack began he woke Sandra up and told her that he was going upstairs to sleep with Christopher. She replied, "Okay." The defendant's speech and appearance were normal. He then asked Sandra if she was okay and she said yes. With his left hand he brushed her hair off of her forehead and put his hand over her mouth and nose. He clamped her nose shut so she could not breath [*sic*] and pushed down hard on her mouth with the palm of his hand so that she could not scream. He then shoved her face into the pillow. While he cut and stabbed her she fought momentarily and then went limp. When she did this he stopped and left her. Sandra struggled to get away. She fumbled with a key to unlock the door but dropped it in a puddle of her blood. She also pushed a security alarm system on her wall. She exited through a kitchen window, which set off an audible alarm, and to a neighbor's house. Getting no response she went to another neighbor's house where she remained until an ambulance and police arrived. She was taken to East Jefferson General Hospital. Brian Bibb was charged with the first degree murder of his two children Christopher, age 5, and Catherine, age 2.

Sandra testified at trial that she observed the defendant in the kitchen with a bottle of Dimetapp. She asked what he was doing and he replied that he was taking Dimetapp because he did not feel well. She asked if he needed anything and he replied that he did not He looked and acted normally according to Sandra.

Dr. Susan Garcia performed the autopsies on the children. She observed numerous cuts on Christopher including cuts to the base of his neck, his hands and below his rib cage. One cut had completely severed his trachea. This caused the child to bleed to death. She also noted that all of the wounds were irregular, indicating that the child was obviously moving when the wounds were inflicted. She also opined that the wounds to Christopher's hands were defense wounds. That is, they were received while trying to protect himself. An examination of the child's lungs revealed what Dr. Garcia referred to as an aspiration pattern. Christopher inhaled blood because of the severed trachea.

Catherine also suffered wounds to the base of her neck, numerous wounds to her right hand, one to her left hand (defense wounds) and several wounds to her shoulder. Her trachea was also completely cut. Additionally, Catherine's jugular was severed. Like her brother, Catherine's lungs revealed that she had aspirated blood prior to dying. Dr. Garcia also noted what she described as hesitation marks on Catherine's neck.

The police officers who responded found the doors locked; they entered the house through the window left open by Mrs. Bibb when she exited. There was blood in the kitchen and in the master bedroom. The defendant did not respond to the police. After several attempts the police succeeded in forcing the door open. A large piece of furniture had been wedged against the door in an attempt to prevent it from being opened. The police found the bodies of Christopher and Catherine. The defendant, nude, was laying face down on the floor. His arms were against his body and his fists were clenched. A knife was found near the defendant's hand with the blade across Christopher's neck. The defendant kept his eyes closed and squinched them tight whenever the officers spoke. There were wounds on the defendant's body.

The defendant was transported to St. Jude Hospital for treatment. He was seen there by Dr. Jacqueline Kirby. She observed that his wounds included those to his neck, arms and a partially collapsed lung. He was in no distress and she saw no need to intubate him. His blood pressure was normal. She described him as being oriented and as responding appropriately to her requests. He made no response, however, when she asked him what had happened.

The defense presented their case, arguing that the defendant was insane at the time the crime was committed. Various doctors and other witnesses testified as to the defendant's mental condition. On rebuttal, the State presented several witnesses. The nurse who treated Bibb at the emergency room testified that Bibb showed no remorse

and did not cry. He did not ask for a Bible, priest, or minister. He did, however, state that he wanted to see a lawyer. Other witnesses also testified as to the defendant's competency. The final witness on rebuttal was Dr. Robert Davis, who testified that, based on his examination of the defendant, that Bibb was not psychotic. Davis opined that Bibb knew the difference between right and wrong when he murdered his children.

Alter hearing closing arguments and receiving the court's charges the jury deliberated and then returned with verdicts of guilty as charged. The next day the sentencing hearing was held. The jury was unable to arrive at a verdict and the court subsequently sentenced the defendant to two life sentences. On February 13, 1992, the defendant was sentenced, on each count, to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. The sentences were ordered to be served consecutively.

On April 8, 1992, counsel for the parties were summoned before the court. The court advised them that the court had been made aware of allegations regarding possible misconduct between a juror and a deputy sheriff assigned to chaperon the jury while sequestered at a hotel. The court gave defense counsel a copy of the report prepared by the Sheriff's Office as a result of its investigation into the allegations. Counsel for defendant attached a copy of this report to his brief. The State provided the court with a copy of another report prepared relative to these allegations.

Defendant filed a Motion For A New Trial which the court, after securing jurisdiction, denied.

Defendant's sentences and conviction were conditionally affirmed by the Fifth Circuit on November 10, 1993, and the case was remanded to the trial court for an evidentiary hearing. Writs were denied by the Supreme Court on September16, 1994. On July 24, 1997, on remand from the Fifth Circuit Court, the district court denied the defendant's motion for a new trial.

(51) State of Louisiana vs. Glen Seals
Docket No. 91-4031 Division "E"
Crime Convicted: First Degree Murder
Sentence: Death
***State v. Seals*, 684 So.2d 368 (La. 1996)**

Raymond Feeney, a cab driver, was working on the night of July 26, 1991. Earlier that evening, Feeney went to his house and spoke with his wife. At that time, Feeney had a large sum of cash in his possession for the purpose of paying the rent on his cab. Feeney left his house and subsequently stopped at a convenience store for dinner. The defendant, Glen Seals, was also at the convenience store, and he hired Feeney to drive him to an address. Upon arriving at the address, Feeney noted that it was in a high crime and crack house area. Seals then gave Feeney another address, also in a high crime and crack area. This happened several times. Each time, upon arrival, Seals gave Feeney another address. Eventually Seals gave Feeney an address in New Orleans.

When the cab arrived in New Orleans, Feeney told Seals to pay his fare and get out of the cab. Seals produced a gun and shot Feeney five times. Seals then drove the cab to Jefferson Parish on the Earhart Expressway. Seals stopped on the Earhart Expressway, robbed Feeney of his money, pushed Feeney onto the side of the road, and stole Feeney's cab. Seals then drove to his sister's house in New Orleans, parking the cab a short distance away from his sister's residence. At his sister's house, Seals cleaned up and changed clothes. He then called another cab and asked to be taken to a Jefferson Parish address along a similar route as the one he had instructed Feeney to take.

The Jefferson Parish Sheriff's Office found Feeney along the Earhart Expressway. Feeney, who was still alive, gave a statement in which he described his assailant. Feeney described a young black male in a red cap. This description, along with a description of Feeney's cab, was broadcast on the police radio. Ed Merida, an off-duty detective with the Sheriff's Office, heard the description on the radio but did not hear the name of the cab company. He saw a cab in

which a young black male wearing a red cap was a passenger, and stopped the cab. Seals, who was the passenger, was found to be in possession of bloody clothing and bloody money. After being advised of his Miranda rights, he admitted shooting Feeney, albeit accidentally. Seals denied robbing the victim.

At trial, the State relied on the following aggravating circumstance: the offender was engaged in the perpetration of an armed robbery.

The jury found the defendant guilty of first degree murder and recommended a sentence of death. His conviction and sentence were affirmed. On September 7, 2000, the district court vacated the sentence and granted Seals a new trial because although the court ordered a sanity hearing on Seal's competency one was never held. This court denied the state's writ application. He is currently awaiting retrial.

(52) State of Louisiana vs. Joel Durham
Docket No. 92-0960 Division "H"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Durham*, 673 So.2d 1103**
(La. App. 5 Cir. 1996)

On the night of February 8, 1992, Joel Durham and Lester Ibesa went for a ride, taking along with them Ibesa's gun. The two discussed committing an armed robbery of a business in order to obtain money. Durham and Ibesa went to one business establishment, which was closed. The two men then went to a McDonald's on Severn Avenue in Metairie. Ibesa was supposed to go inside the McDonald's and commit an armed robbery, but refused when the two men arrived. Durham went inside the McDonald's and robbed Leo Kern, the manager of the restaurant. After surrendering the cash, Kern begged Durham not to shoot him. In front of Kern's fiancé and other patrons of the restaurant, Durham then shot Kern at point blank range. While leaving the restaurant, Durham pointed the gun at another restaurant employee but did not shoot. Durham and

Ibesa then went out drinking with two women, using the money taken from Kern.

Before trial, Ibesa pled guilty to a reduced charge and testified against Durham. Both Ibesa and Durham had given inculpatory statements to the police after having been given Miranda warnings. Durham was found guilty of first degree murder and sentenced to life imprisonment. The aggravating circumstance alleged by the State was: offender engaged in the perpetration of an armed robbery. His conviction and sentence were affirmed on appeal.

(53) State of Louisiana vs. Lester Ibesa
Docket No. 92-0960 Division "H"
Crime Convicted: One count Armed Robbery; One count accessory after the fact to first degree murder.
Sentence: Count one, ten years; Count two, five years;
The Sentences are to run consecutively.

Lester Ibesa was indicted with Joel Durham for the first degree murder of Leo Kern. For a complete recitation of the facts of this case, see Number (52) above. Prior to trial, Ibesa pled guilty to one count of armed robbery of Leo Kern and one count of accessory after the fact to the first degree murder of Leo Kern.

(54) State of Louisiana vs. James W. Mysinger
Docket No. 92-3600 Division "J"
Crime Convicted: First Degree Murder
Sentence: Life without benefit of parole, probation or suspension of sentence.

James Mysinger was a security guard assigned to work at the Comfort Inn in Kenner. On June 1, 1992, Mysinger left the Comfort Inn and traveled a short distance to the Holiday Inn in Kenner. He had been assigned to work at the Holiday Inn from time to time and knew the manager there. He also knew the manager would be alone that night and went to rob him. Upon seeing the manager and speaking to him, Mysinger shot him in the back and in the back of the

head. He then stole approximately $1000.00 from the cash drawer.

After shooting the victim, Mysinger drove to Clarksville, Tennessee, where his mother lived. On the way, he used the money from the robbery to buy a Cobra CB radio.

Mysinger was picked up in Tennessee that day, was advised of his rights and gave a full confession. He was extradited to Louisiana and on January 28, 1993, plead guilty to one count of first degree murder.

(55) State of Louisiana vs. Robert Bates
Docket No. 94-5355 Division "F"
Crime Convicted: First degree murder
Sentence: Life without benefit of parole, probation or suspension of sentence.

Bates was employed by the Racetrack gas station in Harvey. Bates decided to rob another employee of Racetrack who was making a cash drop for Racetrack in the night depository at Whitney Bank on Lapalco. This drop occurred during business hours. As Bates attempted to rob the other employee, he fired several shots. Some of these shots entered the bank, one striking a customer who was waiting to speak to a bank officer. The customer died at the scene.

A plea agreement was struck, whereby several charges were dismissed and Bates pled guilty to first degree murder. He was sentenced to life.

(56) State of Louisiana vs. Manuel Ortiz
Docket No. 92-6496 Division "B"
Crime Convicted: First Degree Murder (two counts)
Sentence: Death (two counts)
***State v. Ortiz*, 96-1609 (La. 10/21/97)**

On October 23, 1992, Cheryl Mallory and Tracie Williams Ortiz were murdered in the Kenner Apartment of Tracie Williams Ortiz. An investigation was conducted by

the Kenner Police Department, resulting in the arrest of Manuel Ortiz, the husband of one of the victims.

The evidence introduced at trial showed that Ms. Ortiz died as the result of being stabbed and Ms. Mallory had been shot. An attempt had been made to make the scene look as if a burglary had occurred. Manuel Ortiz was indicted on two counts of first degree murder.

The evidence at trial consisted of physical evidence obtained at the scene and of the testimony of various witnesses. Several weeks prior to the murders, Manuel Ortiz purchased a knife similar to the one used to murder his wife. The knife purchased by Ortiz was so rare as to be virtually unique. In addition, a witness testified that, several weeks prior to the murder, Ortiz asked him to murder a black female in Kenner in order that Ortiz could receive the insurance money. A few months prior to the murders, Ortiz had insured his wife for $950,000.00.

The defendant took the stand in both the guilt and penalty phases of his trial. Ortiz denied hiring a hitman to kill his wife and presented an alibi defense, claiming to have been out of the country when the murders occurred. The actual gunman in the case has not been arrested. Ortiz was found guilty of two counts of first degree murder and was sentenced to death on both counts on January 31, 1995.

The aggravating circumstances relied on by the State in this case were:

> 1. the offender offered or has been offered or has given or received anything of value for the commission of the offense;
>
> 2. the offense was committed in an especially heinous, atrocious, or cruel manner;
>
> 3. the offender knowingly created a risk of death or great bodily to more than one person.

Defendant's conviction and sentence were affirmed.

(57) State of Louisiana vs. Vernon K. Ledet
Docket No. 97-0311 "G"
Crime Convicted: First degree murder
Sentence: Life imprisonment

On March 23, 1994, Gretna Police officers responded to a neighbor's call for help in locating Thelma Herbert. Police officers entered Herbert's house in Gretna, Louisiana, to find the house ransacked with clothes and furniture strewn about. The body of Thelma Herbert was found in her bedroom. She had been beaten about the head and throat. Police officers seized items from the scene and logged them in evidence.

Police interviewed the defendant, Vernon K. Ledet, in response to information obtained from Herbert's neighbors that Ledet had been harassing Herbert. After the interview, Ledet turned over the clothes and shoes he had been wearing the day Herbert was murdered. DNA testing showed that a spot of his blood was found on Herbert's bra and her blood was found on the bottom of his pants and shoes. Ledet was convicted of first degree murder and sentenced to life imprisonment. The court of appeal affirmed. This court denied writs. *State v. Ledet*, 01- 2451 (La. 9-30-02) 825 So.2d 1185.

(58) State of Louisiana vs. Julius Lucky
Docket No. 94-4525 Division "E"
Crime Convicted: First degree murder; Attempted first degree murder; Aggravated Battery
Sentence: Death
***State v. Lucky*, 96-1687 (La. 4113/99), 750 So.2d 801, cert denied 120 S. Ct. 1429 (2000).**

Julius Lucky and Vashon Kelly worked at a grill and daiquiri shop in Metairie. Two of their co-workers included Letitia Fageot and Bonnie Giambalvo. After closing the establishment at approximately 12.20 a.m. on August 6, 1994, all four workers remained in the establishment. Giambalvo was playing a video poker machine as the others

closed up. Lucky and Kelly remained at the shop that night, though they usually left upon its closing.

While playing poker, Ms. Giambalvo felt a sharp pain in the back of her head and collapsed. Lucky was standing immediately behind and to the right side of Miss Giambalvo just prior to the gunshot. She awoke several minutes later and found Miss Fageot dead in a pool of her own blood. Lucky and Kelly were no longer on the premises.

Lucky had been arrested previously for (3) felonies and (1) misdemeanor and was on parole for burglary and attempted first degree murder at the time of this incident. Kelly also had been previously arrested, though with no convictions.

Kelly was picked up and gave police an inculpatory statement naming Lucky as the one who shot the two girls. Kelly said Lucky chased Miss Fageot, then stood over her while he shot her in the head.

Lucky was picked up and also gave police an inculpatory statement. He stated he brought the weapon to work to kill Fageot, as she had reprimanded him earlier for trying to touch her buttocks and "clowning" around on the job. He further stated that he shot Giambalvo because he did not want her to see him shoot Fageot. After shooting Giambalvo, Lucky chased down Fageot; she dropped to her knees and begged for her life. Lucky then shot her once in the back of the head at point blank range.

Julius Lucky was found guilty of the crime of first degree murder, attempted first degree murder and aggravated battery and was sentenced to death. His conviction and sentence were affirmed. *State v. Lucky*, 96-1687 (La. 4-13-99), 750 So.2d 801, *cert denied* 120 S. Ct. 1429 (2000).

(59) State of Louisiana vs. Edward Irvin Harris
Docket No. 94-6147 Division "P"
Crime Convicted: First Degree Murder, (two counts)
Sentence: Death

On October 14, 1994, Edward Irvin Harris was a passenger in a brown Buick Regal when he spotted two people walking down Betty Street in Marrero, Louisiana with whom he had a prior history, Mister Gordon and Tymara Frazier. Harris drew his pistol and shot at the two pedestrians multiple times, striking each several times.

An officer on patrol in the area came upon the scene soon thereafter and spoke with several witnesses. Frazier was pronounced dead at the scene. Gordon was transported to West Jefferson Hospital where, in the presence of witnesses, made a dying declaration that "Irvin' shot him.

In a photographic line-up which included Harris' photo, several of the eyewitnesses picked Harris out as the one who shot Frazier and Gordon. Family and friends of Gordon also positively identified "Irvin" as Edward Harris.

Harris was found guilty of two counts of first degree murder and sentenced to death. On June 21, 2002, this court reversed his conviction and death sentence and remanded for a new trial.

(60) State of Louisiana vs. Allen Snyder
Docket No. 95-5114 Division "H"
Crime Convicted: First Degree Murder
Sentence: Death
***State v. Snyder*, 98-1 078 (La. 4114/99), 750 So.2d 832**
***State v. Snyder*, 98-1078 (La. 4-14-04), 874 So.2d 739.**

During the early morning hours of August 16, 1995, Howard Wilson and Mary Snyder were talking in Wilson's parked car in front of Snyder's mother's residence. Allen Snyder, Mary's estranged husband, was across the street,

hiding behind a vacant house trailer with a knife. Allen came out of hiding, walked up to the vehicle, opened the driver's door and began to cut and stab Wilson with the knife. As Wilson attempted to drive off, the car struck a fire hydrant, causing the street to flood. Wilson, who managed to escape from the car at that time, ran down the street and collapsed from his injuries. Allen remained in the car and began cutting and stabbing Mary. When a witness, Gwen Williams, approached the vehicle and asked Allen what he was doing, Allen ran down the street.

Wilson, suffering from stab wounds to the face, neck, shoulder and chest, died several hours later. Mary, suffering from lacerations to her neck, face and arm, was able to identify her estranged husband, Allen, as the attacker.

Allen Snyder gave an inculpatory statement to the police after he was given his Miranda warnings. On August 28, 1996, he was found guilty for first degree murder and the jury recommended the death penalty. On August 22, 1997, Allen Snyder was sentenced to death alter the trial court denied defense counsel's motion for a new trial. On appeal this Court remanded for a hearing on the issue of his competency to be tried.

(61) State of Louisiana vs. Teddy Chester
Docket No. 96-2598 Division "K"
Crime Convicted: First Degree Murder
Sentence: Death
***State v. Chester*, 97-2790 (La. 12-1-98),**
724 So.2d 1276 cert denied 528 U.S. 826, 120 S. Ct. 75, 145 L. Ed.2d 64 (1999)

In the early morning hours of December 27, 1995, John Adams, a cab driver for King Cab Co., responded to a passenger pickup in a low income area. A couple of hours later, the cab was found on the side of the road with its lights on and the driver's door open. Adams, slumped behind the steering wheel, had been robbed and shot in the back of the head.

Three months later, the police received information of Teddy Chester and Elbert Ratcliff's involvement in the robbery and murder of Adams. The sister of Chester's girlfriend informed police that she had overheard Chester telling his girlfriend that he had robbed and shot a cabdriver. When questioned by the police Chester admitted that he was at the scene of the crime, but stated that Ratcliff was responsible for the shooting of Adams. Ratcliff however pointed the finger at Chester. The police arrested Chester when they found Chester's baseball cap spattered with Adam's blood. Ratcliff was also arrested when his fingerprints were found on the business cards belonging to Adams.

At Chester's trial, it was determined that he was the gunman because of the blood spattered baseball cap. He was found guilty of first degree murder and sentenced to death. On appeal, his conviction and sentence were affirmed. [Note: The charges against Ratcliff were reduced to second degree murder; he was convicted of second degree murder and sentenced to life imprisonment. See *State v. Ratcliff*, 98-101 (La. App. 5 Cir. 2/23/99), 731 So.2d 357, denied 99-1112 (La. 9/3/99), 747 So.2d 541.

(62) State of Louisiana vs. Barry Pascual
Docket No. 96-1139 Division "F"
Crime Convicted: First Degree Murder
Sentence: Life without the benefits of Probation and parole
***State v. Pascual*, 98-1052 (La. App. 5 Cir. 3/30/99) 735 So.2d 98.**

On February 5, 1996, Kenner Police Department officers were summoned to the residence of Michael Mitchell concerning a shooting. Upon arrival the officer observed a young man, Brett Squatrito, lying face up on the front porch of the residence. Mr. Squatrito was bleeding profusely from the mouth. A blue vehicle was located in front of the residence with the driver side window shattered and a red blood-like substance on the steering column, the driver seat and door. The officers learned that Michael

Mitchell was a passenger in the vehicle along with Mr. Squatrito at the time of the incident.

Upon questioning Mr. Mitchell, the officers learned that Mr. Sqautrito and Mr. Mitchell left the Chateau Supermarket alter playing video games and headed home. While stopped at an intersection, they noticed a white Camaro with two young men in it. Mr. Squatrito pulled up behind the Camaro and revved his engine to see if the young men wanted to race. Mr. Squatrito followed the Camaro for a little while trying to get it to race. Midway down the street, the Camaro stopped and the passenger stuck a gun out of the window. Mr. Squatrito put his vehicle in reverse and began driving the wrong way down the one way street. The Camaro pursued, also going the wrong way down the one-way street.

As Mr. Squatrito reached Mr. Mitchell's house, he drove up onto the yard. The Camaro pulled up next to Mr. Squatrito's vehicle. The passenger reached over the hood of the Camaro and fired three shots at Mr. Squathto's vehicle. The driver side window shattered and Mr. Squatrito and Mr. Mitchell got out of the vehicle and began running towards Mr. Mitchell's residence. Mr. Squatrito collapsed on the front porch. Mr. Squatrito died of a single gunshot wound to the left side of his back.

The officers observed a large amount of shattered glass in the street. A bullet fragment was located among the shattered glass. These facts indicated to the officers that Mr. Squatrito's vehicle was in the street at the time of the shooting. Several neighbors were able to give a description of the occupants in the white Camaro. Another officer on his way home from work heard the broadcast of the shooting over the Kenner Police Department frequency. The officer advised Kenner Police that a similar drive-by incident occurred earlier that evening involving the same vehicle. The victim in this earlier incident was able to positively identify the driver as Derrick Sonnier and was able to positively identify the passenger as Barry Pascual from photo lineups. The Kenner Police Department recovered the white Camaro. Mr. Mitchell positively

identified it as the one that Mr. Squatrito followed and from which the shots were fired.

An arrest warrant was obtained for Barry Pascual on February 6, 1996. On December 3, 1997, a jury found Barry Pascual guilty of first degree murder. On December 19, 1997, Barry Pascual was sentenced to life imprisonment without benefit of probation and parole.

(63) State of Louisiana v. Damon Thibodeaux
Docket No. 96-4522 Division "0"
Crime Convicted: First Degree Murder
Sentence: Death
***State v. Thibodeaux*, 98-1673 (La. 9/8/99),**
750 So.2d 916 cert denied, 120 S. Ct. 1969 (2000)

On July 19, 1996, Jefferson Parish Sheriff officers were summoned to the Champagne residence concerning a missing juvenile. The officers met with Dawn Champagne, the mother of the missing person, Crystal Champagne (age 14). Mrs. Champagne reported that Crystal had last been seen on July, 19, 1996 around 5:15 p.m. near her apartment complex.

Officers began interviewing Crystal's friends and relatives. A friend said that she saw Crystal walking toward the shopping center alone and did not appear to be in any kind of distress. Family members suggested that the police officers talk to Damon Thibodeaux.

The family reported that Damon Thibodeaux was a friend and relative who had recently entered their lives after living in another state for several years. Damon reportedly spent the night in the family residence the night before Crystal's disappearance. The two were expected to go roller blading on the day in question.

While the defendant was being interviewed on July 20, 1996, the body of Crystal Champagne was discovered near the Huey P. Long Bridge in Bridge City, Louisiana. Her body was found laying on an asphalt surface with her shirt and bra pulled up around her neck and her shorts and

panties pulled down around her ankles. Contusions were visible in the right eye, nose and mouth areas. A red plastic ligature was wrapped and tied around her neck. The time of death was pronounced as twenty-four hours earlier.

A polygraph test given to the defendant showed deception regarding the death of Crystal Champagne. Upon questioning, the defendant admitted that he had picked up Crystal from the shopping center in his vehicle, and that he had traveled to Harvey before proceeding to the Mississippi River Bridge area where Crystal's body was found. The defendant claims to have gone to this area for consensual sex with Crystal. As they began to have sexual intercourse, Crystal began complaining about the pain and wanted to stop. The defendant became angry and struck her several times. The defendant continued to have intercourse with Crystal; she continued to resist. The defendant placed his hands around her throat in an attempt to calm her down. He squeezed her neck for fifteen to twenty minutes as he continued to rape her. As Crystal gasped for air, the defendant continued to squeeze her throat until he ejaculated.

At this point, the defendant obtained some wire from his vehicle, placed it around Crystal's neck and secured it tightly until she could not breathe. The defendant claimed to have snapped during this incident and returned to the Champagne residence to participate in the search for Crystal.

A jury unanimously found Damon Thibodeaux of first degree murder on October 3, 1997. On October 4, 1997, the jury returned a verdict of death. On October 24, 1997, Damon Thibodeaux was sentenced to death. This Court affirmed his conviction and sentence.

(64) State v. Ulysses Jones, Jr.
Docket No. 96-6462 Division "G"
Crime Convicted: First Degree Murder
Sentence: Life Imprisonment
***State v. Jones*, 99-1185 (La. App. 5 Cir. 9-22-00)**
769 So.2d 708.

After robbing an E-Z Serve convenience store at 3101 Veterans Boulevard in Jefferson Parish, at approximately 6:35 a.m. on October 5, 1996, the defendant, Ulysses Jones, Jr., drove away in a small, dark-colored car with cash and a bottle of Crazy Horse beer he stole. Convenience store employees called "911" with a description of the robber and the car he had been driving. Deputy James Clarius, who was patrolling nearby, stopped Jones in a small dark colored car. When the deputy attempted to put handcuffs on Jones, Jones started scuffling and obtained the deputy's gun. Jones shot Deputy Clarius with his own gun, ran to his car and drove away. A distinctive watch found at the scene linked Jones to the shooting.

Two convenience store employees picked Jones' picture from a photographic line-up as the E-Z Serve robber. Because he fit the broadcast description of the deputy's killer, Jones voluntarily appeared at the police station to give a statement. Jones told police that he had been with his girlfriend at the time of the shooting. He denied owning the distinctive watch although he admitted his father had a similar watch. He denied having anything to do with Deputy Clarius' murder.

Investigation uncovered the fact that early on the morning of the crime; Kenner Police Officer Keith Seals received a phone call from his girlfriend's brother, Ulysses Jones. He also talked to his girlfriend, who asked him about the murder of the deputy although she had never asked him about his work before. A search warrant was obtained and executed for the apartment where Jones lived. In a flower bed outside the apartment, police found a full, unopened bottle of Crazy Horse beer in an E-Z Serve plastic bag. In a search of the area by the canal bank next to the apartment, police found a plastic bag which contained Deputy Clarius'

handgun. Inside the apartment, $338 in cash was found hidden. It was determined that approximately $319 was stolen from the E-Z Serve.

Witnesses positively identified the watch found at the crime scene as one which had belonged to Jones' father and which Jones habitually wore. Witnesses testified that Jones and his family members were attempting to contact law enforcement personnel through their fiends immediately after the shooting. Jones' girlfriend denied that Jones had been with her at the time of the shooting. The jury unanimously found Jones guilty of first degree murder of Deputy Clarius. The jury deadlocked on sentencing and the trial judge imposed a sentence of life imprisonment. His conviction and sentence were affirmed.

(65) State v. Emmett Taylor
Docket No. 97-1142 Division "G"
Crime convicted: First Degree Murder
Sentence: Death
***State v. Taylor*, 99-1311 (La. 1/17/01), 781 So.2d 1205.**

On February 18, 1997, Emmett Taylor entered the Rhodes Pharmacy in Harvey, La. at approximately 11:50 a.m. Inside the pharmacy was the 83 year old pharmacist, Joseph Sunseri, and the 69 year old clerk, Marie Toscano. Taylor asked Toscano for a certain product. When she was unable to find it, she asked Sunseri to help Taylor. When Sunseri attempted to help Taylor, Taylor placed a .38 caliber revolver at Sunseri's side and demanded money. Sunseri told Toscano to give Taylor the money out of the cash register. Instead, Marie Toscano tried to run to the back of the store. Taylor followed her and shot her in the back of the head before she could unlatch the door. In addition to eyewitness testimony, the state presented Taylor's confession. Although Taylor initially gave an alibi statement, he ultimately admitted to trying to rob the store. Taylor claimed the shooting was an accident. On May 21, 1998, he was found guilty of first degree murder. On May 22, 1998, the jury recommended the death penalty, finding as aggravating circumstances that the crime was committed

during the perpetration of an armed robbery, that the victim was sixty-five years old or older and that the defendant had previously been convicted of an unrelated armed robbery. On July 17, 1998, Taylor was formally sentenced to death alter the trial judge denied defense counsel's motion for new trial.

(66) State v. Ryan Matthews
Docket No.97-3780 Division "M"
Crime Convicted: First Degree Murder
Sentence: Death

On April 5, 1997, Tommy Vanhoose was working in his convenience store in Bridge City, Louisiana. Late in the afternoon, an armed gunman wearing a ski mask entered the store and demanded money. Vanhoose was known for having large quantities of cash because he cashed paychecks for Avondale Shipyard workers. The victim refused to give the gunman any money and the gunman shot Vanhoose several times. As the gunman fled the store, he stopped at the cash register near the door, lifted his mask and tried to obtain money from the register. He then left the store, firing shots toward a witness, Candice Meza. The gunman fled to a waiting car at the corner and jumped in through the open passenger window. The car then sped down the street.

Two witnesses, cousins Bretit Cheramie and Dale Blanchard, wee driving around the same corner. They saw the defendant dive into the car. Cheramie, who was driving, followed the car down the street. Both he and Blanchard saw that the defendant was the passenger and another young black man was the driver. Cheramie could not keep up with the speeding car but did see the defendant throw something from it. Cheramie dropped off Blanchard, went back, and retrieved the ski mask. Cheramie again attempted to follow the defendant by another route but was unsuccessful in catching up, although he did see the car gain. Both Cheramie and Blanchard described the car to police.

Later that night, police stopped a car that matched the description. Travis Hayes was driving; the defendant was

the passenger. Cheramie and Blanchard were taken to the scene. Cheramie positively identified the defendant, Ryan Mathews, as the gunman. He told police he saw the defendant take off the ski mask as he dove into the car. Neither witness identified Hayes. Both Hayes and Mathews were taken to the detective bureau and gave statements. Hayes initially denied any knowledge of the robbery and shooting but eventually admitted to driving the defendant to the scene and fleeing after the defendant ran out of the store. Hayes denied any knowledge of the robbery and shooting. The defendant gave several statements. Mathews denied any knowledge of the incident but admitted being in the area prior to the robbery.

Candice Meza made a tentative identification of Mathews as the person she saw flee from the store and shoot at her. Both Hayes and Mathews were indicted for first degree murder. The state reduced the charge against Hayes to second degree murder and he was convicted as charged.

Mathews was tried for first degree murder. Cheramie repeated his identification of the defendant. Candice Meza positively identified the defendant at trial. She said that her previous tentative identification of the defendant was actually a positive identification but that she had been too afraid to tell the detective. The jury found Mathews guilty as charged. The jury found two aggravating circumstances: the defendant created the risk of death to more than one person and the killing occurred during the perpetration or attempted perpetration of an armed robbery. Mathews was sentenced to death. While is appeal was pending a motion for a new trial was granted.

(67) State of Louisiana vs. Douglas Shoemake
Docket No. 97-3840 Division "M"
Crime Convicted: First Degree Murder, guilty plea
Sentence: Life

On April 14, 1997, David Lamar Shoemake of 448 Genie Court, Avondale, La., made a 911 call when he arrived home from work and discovered his wife, Fay

Shoemake, dead on the kitchen floor and covered with blood. Jefferson Parish Sheriff's deputies responded to the call and were escorted by David Shoemake to the kitchen. EMS was immediately requested but the victim did not show any signs of life. Investigation revealed that the victim had been shot once by a shotgun in the left temple with an exit wound in the right rear of her head. The pellet continued out of the rear window and into the back yard. The scene showed that the victim had been involved in some type of physical altercation prior to the shooting because the kitchen furniture was in disarray. The victim's purse was missing, as well as the family's 1995 Ford pick-up truck.

Police later learned that the victim and David Shoemake had a son named Douglas, who had been residing with them for several years due to a drug habit and other problems. Through a neighborhood canvas and interviews, police learned that Douglas Shoemake argued with his mother at the residence about repaying money and then shot her. Douglas Shoemake fled the scene but was later apprehended at a Winn Dixie store in West La. while attempting to cash one of his mother's checks taken during the incident.

On May 11, 1998, Douglas Shoemake withdrew a plea of not guilty and tendered a plea of guilty as charged to first degree murder On January 22, 1999, Douglas Shoemake was sentenced to life in prison without benefit of parole, probation or suspension of sentence.

(68) State of Louisiana vs. Elzie Ball
Docket No. 96-4222 Division "C"
Crime Convicted: First Degree Murder
Sentence: Death

Around ten in the morning on May 15, 1996, Elzie Ball entered The Pub Lounge. For a couple of hours, he sat at the bar socializing with the bar owner and a few others and having a few drinks. Around 12:45 p.m., after bar owner left, Ball produced a revolver and pointed to the head of a patron. After forcing the patron into the restroom, Ball

demanded money from the barmaid. While the robbery was in progress, Bernard Scorsone, a Budweiser deliveryman, entered the lounge. Seeing the robbery taking place, Scorsone, attempted to disarm Ball but was shot by Ball two times. Scorsone, with gun shot wounds to the back and arm, ran outside of the bar where he collapsed and died. Moments later, Ball ran out of the bar and drove off in his vehicle. A witness was parked across the street eating his lunch when he heard what sounded like gun shots. Seeing Ball hurriedly run out of the bar and get into his vehicle, the witness decided to follow him in his vehicle. A few minutes later, he lost him.

Days later, an anonymous source provided the police with Ball's name as the potential suspect in the homicide and robbery. The descriptions the source gave concerning Ball and his vehicle fit the descriptions given by the witnesses of the crime. With this information and the positive photo identification of Ball by the witnesses, the police apprehended and arrested Ball.

On May 23, 1997, Ball was convicted of first degree murder and was sentenced to death.

(69) State of Louisiana vs. Lawrence Jacobs and Roy Bridgewater
Docket No. 96-7161 Division "H"
Crime Convicted: First Degree Murder
Sentence: Death
***State v. Jacobs*, 99-1659 (La. 6/29/01), 789 So.2d 1280**
***State v. Bridgewater*, 00-1529 (La. 6-21-02), 823 So.2d 877**

On October 31, 1996 Jefferson Parish Sheriffs officers were summoned to Nelson Beaugh's residence in Marrero, Louisiana to investigate a double homicide. Mr. Beaugh and his mother, Della, had been found murdered by Mr. Nelson's mother-in-law, Marilyn Williams. Mrs. Williams had arrived at the Beaugh's residence to perform some housekeeping tasks when she discovered the murdered bodies in the master bedroom.

As officers began to investigate, it became apparent that the Beaugh residence had been burglarized. Mr. Beaugh's minivan was missing from the driveway. One of the double car garage doors was opened. The door leading from the garage to the main house was open. The bathroom in the master bedroom had been ransacked. A large, multi-drawered, jewelry box had been emptied of its contents and the drawers were placed atop a wicker basket nearby.

Costume jewelry was found scattered throughout the residence. The kitchen cabinets were open; a bowl usually containing keys, hardware and coins was empty. Vertinal blinds covering the rear door in the living room were partially torn down. Mr. Beaugh's younger son's room showed extensive activity. Articles were thrown onto the floor, small trinket boxes were opened and thrown onto the bed and the mattress had been partially removed from the box spring. During the investigation of the Beaugh's residence the officers learned that a neighbor, Ms. Brenda Menard, had called the police concerning two suspicious males in the neighborhood. Ms. Menard gave the police a statement and could positively identify the men. The officers received a call concerning a fire. Officers discovered a burning briefcase containing a deposit Mr. Beaugh's bank account. The minivan was found nearby. The officers were able to obtain several fingerprints from the minivan. The officers also learned at this time that another similar burglary had occurred on October 30, 1996. The suspect in this earlier case fit the description provided by Ms. Menard. The suspect was identified as Lawrence Jacob. The officers were able to match the fingerprints lifted from the minivan with Lawrence Jacobs.

On November 1, 1996, Kenneth Bridgewater was arrested on unrelated charges. Mr. Bridgewater advised the officers that his brother, Roy Bridgewater, and Lawrence Jacobs had spent the night at Mr. Bridgewater's residence on October 30, 1996, the night before the murders at the Beaugh's residence. The officer found that Roy Bridgewater closely fit the description of the second suspect Ms. Menard had identified.

On November 1, 1996, an arrest warrant was obtained for Lawrence Jacobs for two counts of first degree murder and one count of aggravated burglary. On November 2, 1996, Roy Bridgewater surrendered himself to Jefferson Parish Second District Officers. On November 3, 1996 Lawrence Jacobs surrendered to police.

A jury found Lawrence Jacobs guilty of first degree murder on April 18, 1998. On May 18, 1998, Lawrence Jacobs was sentenced to death. Roy Bridgewater was convicted in a separate trial on October 31, 1998. He was sentenced to death on November 11, 1998. On appeal, this Court reversed Jacobs' conviction and sentence due to reversible error in voir dire.

Bridgewater's conviction was reduced to second degree murder on January 15, 2002. Rehearing was granted his first degree conviction was reinstated and the death sentence reimposed.

(70) State v. Jarrell Neal
Docket No. 98-3238 Division "D"
Crime convicted: First Degree Murder
Sentence: Death
***State v. Neal*, 00-0674 (La. 6/29/01), 796 So.2d 649, 2001 WL 74332**

On March 31, 1998, at approximately 11:45 p.m., Zannie Neal and his brother Jarrell Neal forced their way into a side door at 1333 S. Wilson in Kenner, Louisiana. Zannie was armed with a revolver and land was armed with, an AK-47. Waiting outside in a black Toyota 4-Runner was Arthur Darby. Inside 1333 S. Wilson was Greg Vickers, who was there to purchase crack cocaine from Fergus Robinson. After entering the residence, Zannie hit Vickers with the revolver and the gun discharged. At that time, Jarrell opened fire with the AK-47. Vickers was shot numerous times in the torso and fell just inside the threshold of a door. Robinson and Claudette Hurst, a woman who was also in the residence, ran into a front room where Carl Duncan and Keinna Porter were located and closed the

door. Both Zannie and Jarrell tried to enter the room but the Robinson and Duncan were holding the door shut from inside. Jarrell fired several times through the door, killing Robinson and wounding Duncan in his right arm. Both Vickers and Robinson were pronounced dead on the scene with multiple gunshot wounds. The others who were present in the residence were not injured, including two women and three children. Zannie and Jarrell fled on food through the side door.

As Zannie and Jarrell fled the scene, they approached a parked vehicle. Seneca Johnson and Larry Osborne were sitting outside in the vehicle. As he exited the residence, Jarrell continued to fire the AK-47, hitting Johnson in her buttock and leg.

Off-duty deputy Derrick McGee observed a black Toyota 4-Runner parked on Ivy near its intersection with S. Wilson. Shortly afterwards, Deputy McGee heard numerous gunshots coming from the 1300 block of S. Wilson. He saw the Toyota driving east on Ivy toward Little Farms Avenue. The vehicle ran a stop sign and turned west onto Park Avenue. The vehicle turned south again onto Tudor Avenue and proceeded to Jefferson Highway.

The Toyota turned west when it reached Jefferson Highway and ran the red light at Filmore Avenue. Deputy Harold Bourgeois pulled in back of the vehicle and activated his overhead emergency lights. The Toyota speeded up and turned north onto Taylor Avenue. As the Toyota headed north on Taylor Avenue towards Airline Highway, officers observed the passenger, later identified as Jarrell Neal, firing at both units that were in pursuit. Upon reaching Airline Highway, Jarrell either jumped or fell out of the Toyota onto Airline Highway with the AK-47 still in his hands. Officers McGee and Bourgeois apprehended him.

Meanwhile, the Toyota continued across Airline Highway on Taylor and struck a tow truck that was parked on the side of the road. The driver, later identified as Arthur Darby, exited the vehicle and fled on foot. He was subsequently arrested by K-9 officers. Another passenger,

Zannie Neal, remained in the rear seat of the vehicle and was apprehended at that time.

As a result of their actions, Arthur Derby, Zannie Neal and Jarrell Neal were arrested and each charged with two counts of first degree murder, two counts of attempted first degree murder of a police officer and five counts of attempted second degree murder. Derby testified for the state after pleading guilty to two counts of manslaughter and receiving a sentence of 20 years. Zannie Neal's trial is presently pending. The state brought Jarrell Neal to trial on two counts of first degree murder. On March 1, 1999, Jarrell Neal was convicted of both counts of first degree murder and sentenced to death. On June 4, 1999, Jarrell Neal was formally sentenced to death.

(71) State of Louisiana vs. Titrus Davis
Docket No. 99-5533 Division "E"
Crime Convicted: First Degree Murder
Sentence: Life

On June 20, 1999, the body of Jermain Cosse was found in Jefferson Parish. The post- mortum [*sic*] revealed that the victim had died as the result of manual strangulation. There was duct tape around the victim's hands and neck The investigation led them to Ryan Lawrence who said that he and the victim got into a red car driven by Titrus Davis on June 18, 1999. Davis and Cosse were in the front seat and Lawrence and Michael Williams were in the back. After driving around to different clubs, Titrus Davis pulled a sawed off shotgun out and told the victim to "give it up" and took his shoes and wallet. Davis then b[illegible]nd and gagged the victim with duct tape. Williams then bund [*sic*] Lawrence's hands with duct tape while Lawrence was held at gunpoint.

Davis then drove to a canal at the end of Manhattan Blvd., at which time Davis strangled the victim to death with a shoestring. Williams aided in the process briefly, but the assault lasted for many minutes. Once they believed that the victim was dead, Davis and Williams dumped the body in the nearby canal. They then proceeded to another

location where Davis told Lawrence that if he was arrested that Lawrence and his family would be killed. After interviewing Lawrence, the detectives obtained a search warrant for Davis' home and he was arrested there on June 27, 1999. Davis gave a statement and advised that he killed the victim because he had slept with Davis' retarded cousin.

(72) State of Louisiana vs. Elton Cowart
Docket No. 99-5664 Division "C"
Crime Convicted: First Degree Murder
Sentence: Life

In July, 1999, Darian Burse was killed during the commission of an armed robbery at the Beechgrove Apartments on the Westbank of Jefferson Parish. The police investigation indicated that the victim was accosted by three men – one acted, as a lookout (never apprehended); one rifled through his pockets demanding money (Moses Beverly); and one shot him several times fatally wounding him (Elton Cowart).

The trials of Cowart and Beverly were severed. On November 29, 2000, Elton Cowart was tried on the charge of First Degree Murder. The jury found him guilty as charged but a life sentence was imposed when the jury could not unanimously agree on a verdict. Cowart was sentenced to life imprisonment on February 12, 2001.

(73) State of Louisiana vs. Larry Harris and Leon Williams
Docket No. 00-2434 Division "G"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Harris*, 03-1297 (La. App. 5th Cir. 30-04), 871 So.2d 599**

On February 22, 2000, the defendants ambushed Vanessa Mack, her cousin Melinda Wheeler James and a friend, Ronald Lewis, as they left the Sport Palace baron Jefferson Highway in Jefferson Parish, Louisiana. Larry Harris had dated Vanessa Mack for a year and a half, but she had ended the relationship a few months before the

shooting. Larry Harris and Leon Williams were friends who worked together. Vanessa Mack, the intended target, was shot five times but recovered. Melinda Wheeler James was killed. Ronald Lewis, who was walling the women to their car, was finding that the killing of Melinda Wheeler James was committed when the offenders had the specific intent to kill or inflict great bodily harm upon more than one person. The jury recommended life sentences for both defendants on April 1, 2001. The trial judge sentenced the defendants to life sentences on April 27, 2001.

(74) State v. Thoa Tan Lam
Docket No. 97-1240 Division "H"
Crime Convicted: First Degree Murder
Sentence: Death

The defendant, Thoa Tan Lam, who had worked with the victims' family in the past, arrived at the Truong house at 3820 Chriswood Drive in Harvey, Louisiana, on February 4, 1997. Words were exchanged and the defendant shot Phuong Tu Tran, Truong's brother. Dat Phat Truong, who had been sitting on the sofa, rushed toward the defendant and was fatally shot Nguyet Minh Lam, wife of Dat Phat Truong, entered the room to find out what the shooting was about and was shot and injured. Nguyet Minh Lam ran outside to a neighbor's house and alerted the police. Hearing the shots, 8-year son old Kerry Truong and 18-year old daughter Han Ngoc Truong walked down the stairs. The defendant fatally shot the girl in the head. The young boy ran out of the house. The defendant went into another room and shot himself in an unsuccessful suicide attempt.

The jury found Lam guilty of first degree murder and recommended he receive the death penalty. The aggravating circumstances found by the jury in the penalty phase was [*sic*] that the defendant knowingly created the risk of death to more than one person and that the murders were committed in an especially heinous, atrocious or cruel manner. Lam was sentenced to death. This court remanded for proceedings relative to the accuracy of the translation at trial.

(75) State of Louisiana vs. Michael Legrand
Docket No. 99-4550 Division "F"
Crime Convicted: First Degree Murder
Sentence: Death
***State v. Legrand*, 02-1462 (La. 12-03-03), 864 So.2d 89.**

On May 18, 1999 at approximately 4:59 p.m., deputies from the Jefferson Parish Sheriff's Office responded to a call at 2600 Houma Blvd. Apt. 106 in Metairie, Louisiana. When deputies entered the apartment, they found the lifeless body of Rafael Santos on the floor. Santos was stabbed multiple times in the head, chest, back, and throat. There were defensive wounds on his hands and his front tooth was knocked out of his mouth. The apartment showed signs of a struggle and several weapons were found in the area of the body, including several bent or broken kitchen knives, a pair of scissors and two flathead screwdrivers. A canvass of the apartment complex revealed that Santos was last seen alive on May 15, 1999.

On May 19, 1999, detectives developed information from Francine Flick and Kevin Brown that Michael Legrand was the perpetrator of the murder. Both Flick and Brown gave statements describing Legrand covered in blood on Saturday, May 15, 1999. Brown stated that Legrand admitted killing Santos. On May 20, 1999, deputies obtained an arrest warrant for Legrand. After being arrested and advised of his rights, Legrand gave a statement in which he admitted killing Santos for his compact disc collection. Legrand stated that Judy Fairness and Clayton Runnels helped him obtain and sell the CD collection. Legrand admitted that he and Runnels had tried to rob the victim prior to the murder but the attempt failed. Legrand told the detectives that Santos had cried out for help after being stabbed, but Legrand ignored him as he removed all the CDs from the apartment to his car. Legrand washed off in Santos's apartment and changed into Santos's clothes before he left.

Trial began on September 25, 2000. On September 28, 2000, the jury unanimously found Legrand guilty as

charged of first degree murder. On September 29, 2000, the jury unanimously recommended the death penalty finding as aggravating circumstances that Legrand was engaged in the perpetration or attempted perpetration of an armed robbery and that the offense was committed in an especially atrocious or cruel manner. Legrand was sentenced to death on February 16, 2000.

(76) State v. Shawn Higgins
Docket No. 00-4999 Division "I"
Crime Convicted: First Degree Murder
Sentence: Death
Modified Verdict: Second degree murder
Sentence on modified verdict: Life imprisonment

On October 25, 1998, Wanda Brown was leaving the Westbank Lounge when she saw the defendant, Shawn Higgins, confronting the victim, Donald Price. Ms. Brown could not hear what the men were saying, but she could tell that they were arguing, and she could see that Higgins was holding a gun pointed at Mr. Price in one hand, while he gestured for Mr. Price to give him something with the other hand. Ms. Brown could see that the victim was refusing to give something to the defendant. She saw the defendant shoot the victim and then run.

Deputy Sanderson, who was responding to the area of the crime scene, went to the nearby residence of Ruby Wells to investigate a suspicious person complaint. Ms. Wells heard gunshots, looked out the window, and saw a man enter a neighbor's yard, jump over her fence, and run to the side of the house. Deputy Hymel investigated the rear yard and located a red and blue plaid shirt, a black visor, a glove, a stainless steel revolver, and a blue and white bandana, all concealed under a broken swing. The gun was later determined to be the weapon used to kill the victim, Donald Price. A small amount of blood on the bandana was tested and the genetic profile of the sample was determined to be consistent with that of the defendant, Shawn Higgins. Ms. Brown, who did not know the victim or the perpetrator, subsequently identified a photograph of the defendant in a

photographic lineup procedure conducted in February of 2000.

The jury found Higgins guilty as charged of first degree murder on May 10, 2002. On May 11, 2002, the jury returned a verdict of death after finding the following aggravating circumstances: 1) the killing was committed during the perpetration or attempted perpetration of an armed robbery; and 2) the offender has previously been convicted of an unrelated murder. This Court set aside the defendant's first degree murder conviction on appeal and modified the jury's verdict to render a judgment of guilty of second degree murder. The case was remanded to the trial court for resentencing. On May 10, 2005, the trial court resentenced Higgins to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence.

(77) State of Louisiana vs. Kellen Parker
Docket No. 02-4386 Division "N"
Crime Convicted: First Degree Murder
Sentence: Life
***State v. Parker*, 04-1017 (La. App. 5 Cir. 3/29/05) 901 So.2d 513; writ denied 05-KO-1451 (La. 1/13/06) 920 So.2d 235.**

On June 6, 2002, Paul Fasullo and his two year old daughter, Samantha, were sleeping in their residence. His wife, Shannon Fasullo was awake and using her computer, when she heard a knock on the door. She put on a robe and opened the door. Dustin Dressner and Kellen Parker were at the front door. Dressner asked Shannon if her nephew was home and she told him that he was not. As she turned to close the door, she was struck in the back of her head with an object Shannon screamed for Paul, and crawled from the foyer area to the living room while the men continued to beat her with the object.

When Shannon was able to get to her feet, she saw her husband struggling with Dustin Dressner over a knife in the hallway. Dressner had the knife in his right hand, and her husband was holding Dressner's wrist. Shannon grabbed the

phone and called 911 from the master bedroom. As she screamed in the phone for help, Dressner entered the room followed by Kellen Parker. Dressner was armed with a silver knife. Dressner tried to cut her throat, but couldn't do it because her chin was down. He sliced her left eye vertically. She pushed him away and ran into the bathroom, closing the door and locking it. She could hear Dressner in the background saying "The bitch won't die, the bitch won't die!" The men kicked the door down on top of her, and one of them reached around it and stabbed her several times. Paul Fasullo was stabbed a number of times and died on the scene.

Shannon Fasullo identified Dustin Dressner, who had been to the Fasullo residence previously with Brandon Sapia, a friend of her nephew, Michael Fasullo, from a photographic lineup. Although Shannon was unable to identify Kellen Parker as the second perpetrator, Parker made a statement to police in which he admitted entering the victim's house with Dressner, who he referred to as "Shorty," while Troy Arnaud waited in the car. In his statement, Parker also admitted stabbing Shannon Fasullo three times in the shoulder after Dressner hit her on the back of the head with a wine bottle in a paper bag, and to being present when Dressner kicked in the victim's bathroom door.

Kellen Parker testified at his trial. Although he admitted entering the house with Dustin Dressner, he denied any involvement in the attack on Paul Fasullo, or in his murder. He admitted to stabbing Shannon Fasullo three times, but claimed that he stabbed her only after she lunged at him. The evidence indicated that Shannon Fasullo was stabbed more than a dozen times. The jury found Kellen Parker guilty of first degree murder on November 22, 2003. After the jury was unable to reach a unanimous determination as to the defendant's sentence, the trial court imposed a sentence of life imprisonment. The Louisiana Fifth Circuit Court of Appeal affirmed the defendant's conviction and sentence on appeal.

(78) Dustin Dressner
Docket No. 02-4386 Division "N
Crime Convicted: First Degree Murder
Sentence: Death

Dustin Dressner was indicted with Kellen Parker for the first degree murder of Paul Fasullo. For a recitation of the facts of this case, see Number (76) above.

On May 23, 2004, the jury found the defendant guilty as charged of first degree murder. On May 24, 2004, the jury determined that the defendant should be sentenced to death. As aggravating circumstances, the jury found that the crime was committed in an especially heinous, atrocious, or cruel manner, and that the offender knowingly created a risk of death or great bodily harm to more than one person. On November 18, 2004, the trial court sentenced the defendant to death.

2) A list of each capital aggravated rape case in which sentence was imposed after August 15, 1995.

(1) John Kinsel
Case No. 96-7544 "H"
Conviction: Aggravated rape
Sentence: Life imprisonment
State v. Kinsel, 00-KA-1 610 (La. App. 5 Cir. 3/28/01) 783 So.2d 532; *writ denied* 01-K-1230 (La. 3/28/02) 812 So.2d 641

At trial, the victim, A.M. testified that John Kinsel's sexual abuse of her began when she was six years old in Monroe, Louisiana. From Monroe, A.M. and her family moved to a home on Mason Street in Gretna, Louisiana. A.M. testified that while her mother was at work during the day, defendant, who resided with them at the time, would take her into his room and sodomize her. A.M. estimated that this occurred five or six times while she lived at the Mason Street address.

A.M., and her family moved from Mason Street to her grandfather's residence on Sheree Lyn Court in Gretna, Louisiana. A.M. testified that at the residence on Sheree Lyn, defendant would wake her up in the morning and bring her to the bathroom, where he would penetrate her anally. At this address, defendant also made vaginal penetration. .A.M. estimated that defendant raped her approximately ten times while she resided with her grandfather.

Finally, A.M. and her family moved into a residence on Hunterbrook Street. On one afternoon, A.M. testified that defendant had become upset with her about something she had told friends about defendant. She and defendant were alone in the house, and defendant began to choke her, saying, 'Don't tell anyone that I've ever done this, or I'll kill you, and then I'll kill your whole family." The defendant then raped her vaginally and forced her to perform oral sex upon him.

Eventually, A.M. told her mother that defendant had touched her in a way she didn't like. A.M. then told a school counsel about the abuse, indicating she wanted the police to be contacted, but not her parents.

A physical examination of the victim revealed abnormalities in the area around the hymen which were consistent with, but not 100 percent indicative or, sexual abuse or blunt trauma.

The victim's mother, Ms. M., testified that the defendant did not reside with her family from November 1993 to May 1994, the period of time when the family lived at Sheree Lyn Court in Gretna, Louisiana. Ms. M. Also stated that she suspected her daughter was lying about the accusation.

The defendant also testified at trial and denied performing any sexual acts with A.M, and also denied ever living on Sheree Lyn Court with the family.

On January 30, 1997, the defendant was charged by bill of information with the aggravated rape of A.M., a person

under twelve years of age. The indictment alleged the offense occurred from on or about November 1992 through October, 1995, and thus includes a period prior to the August 15, 2005 effective date of the amendment to La. R.S. 14:42 authorizing the death penalty for the rape of a child under twelve. Although the bill of indictment alleged the victim to be a juvenile under twelve and indicated that the matter was a first class case, the State did not seek the death penalty.

A jury trial began February 11, 1998. On February 13, 1998, a defense motion for mistrial was granted. A new trial was held August 30, 1999 - September 1, 1999. The jury found Kinsel guilty as charged of aggravated rape. On December 7, 1999, the trial judge sentenced Kinsel to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence, with credit for time served. On March 28, 2001, the Louisiana Fifth Circuit Court of Appeal affirmed petitioner's conviction on direct appeal. *State v. Kinsel*, 00-1610 (La. App. 5 Cir. 3/28/01) 783 So.2d 532. This Court denie petitioner's application for writ of certiorari on March 28, 2002, *State v. Kinsel*, 01-1230 (La. 3/28/02) 812 So.2d 641.

(2) State of Louisiana v. Donald Sims
Docket No. 98-849, Division "N"
Crime Convicted: Aggravated Rape
Sentence: Life
***State v. Sims*, 00-KA-1728 (La. App. 5 Cir. 5/30101) 796 So.2d 941 (Table)**

On December 17, 1997, when the victim, S.S., was seven years old, she stayed home from school because she was ill. She was called into the living room by defendant, her eighteen year old cousin, who also lived at the house. Defendant then placed his hand over her mouth, removed her underwear and "put [his private part] in [her] private part." Defendant told her not to tell anyone.

About a week later, after noticing a foul odor emanating from her daughter, the victim's mother discovered a brown discharge in the victim's underwear. When questioned by

her mother, the victim reported the incident. S.S. was taken to the emergency room, where she was diagnosed with vaginitis and vaginal pin worms. Laboratory tests for chlamydia and gonorrhea were reported as negative at this time. A few months later, the victim was re-examined by an expert in the field of child sexual abuse. Tests conducted during the re-examination were positive for chlamydia and gonorrhea in both the vagina and anus of the victim.

The defendant was indicted for aggravated rape of a seven year old child, a violation of LSA-R.S. 14:42. Although the case was instituted as a first class case and initially prosecuted as a capital case, prosecutors subsequently determined that they would not seek the death penalty in this matter. The defendant waived a trial by jury and was subsequently found guilty as charged by the trial court on July29, 1999. On September 9, 1999, the trial court sentenced the defendant to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

The defendant's conviction and sentence were affirmed by the Louisiana Fifth Circuit Court of Appeal on May 30, 2001.

(3) State of Louisiana v. Fred J. Leblanc
Docket No. 98-5862, Division "G"
Crime Convicted: Aggravated Rape
Sentence: Life
***State v. Leblanc*, 00-1322 (La. App. 5 Cir. 5131101) 788 So.2d 1255; *writ denied* 01-K-1920 (La. 5/24/02) 816 So.2d 299**

The victim, J.S., became acquainted with the defendant through her father, who had told her that the defendant was her uncle. The defendant babysat for J.S. over a period of years while her father was working offshore and her mother was out socializing in "bars." From the time that she was four years old, the Defendant forced J.S. to submit to a variety of sex acts, including fondling, oral sex, anal sex, and vaginal sex. He also made her perform oral sex on him,

and had her watch pornographic videotapes and magazines. The defendant repeatedly told her not to tell anyone.

In late January of 1998, the victim's aunt began living with J.S. As a result of caring for J.S. she noticed a "very heavy discharge" in J.S.'s underwear. She became suspicious after observing that J.S. became upset and cried after speaking with the defendant on the phone, and after observing the defendant ask J.S., "Where is my hug and kiss?" The victim disclosed the abuse to her aunt after her aunt discovered her crying uncontrollably.

The State elected to seek the death penalty. Trial before a jury of twelve persons began on February 14, 2000 and concluded on February 16, 2000. The jury unanimously found the defendant to be guilty as charged. During their penalty phase deliberations on March 3, 2000, the jury became hopelessly deadlocked. Therefore, as required by law, the trial court sentenced the defendant to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The Louisiana Fifth Circuit Court of Appeal affirmed Leblanc's conviction and sentence on appeal.

(4) Robert Bourgeois
Case No. 99-2714 "C"
Conviction: Aggravated rape, aggravated incest, aggravated oral sexual battery
Sentence: Life Imprisonment (aggravated rape), 15 years (aggravated incest and aggravated oral sexual battery
***State v. Bourgeois*, OO-KA-1353 (La. App. 5 Cir. 4/11/01) 786 So.2d 771**

Between January of 1993 and November of 1996, the Robert Bourgeois sexually molested his great-granddaughter who was between the ages of nine and twelve. The sexual acts occurred while the defendant babysat the victim in the victim's home. Over the three year period, the defendant french-kissed, fondled, performed oral sex on the victim, and showed the victim pornographic videotapes. In addition, the defendant had the victim perform oral sex on

him. The defendant attempted intercourse with the victim several times, but stopped when she cried out in pain. The victim reported the sexual abuse to her mother who called the police. The defendant subsequently gave a confession and was arrested.

On May 13, 1999, the defendant was charged by bill of indictment with the aggravated rape of a juvenile under twelve years old in case number 99-2714. A separate bill of indictment was filed in case number 99-3125, charging the defendant with aggravated incest and aggravated oral sexual battery. On July 16, 1999, the State determined that it would not seek the death penalty in case number 99-2714. The State dismissed case number 99-3125, and amended the bill of indictment in case number 99-2714 to add the counts previously charged in case number 99-3125.

After a two day trial on November 17 and 18, 1999, the Defendant was unanimously found guilty as charged on all three counts by a twelve person jury. He was subsequently sentenced to life imprisonment at hard labor on the aggravated rape conviction and to fifteen years imprisonment at hard labor each on the aggravated oral sexual battery and aggravated incest conviction, to run concurrent with his life sentence. On appeal, the Louisiana Fifth Circuit Court of Appeal affirmed the defendant's convictions and sentences in part, but remanded the case in part for further proceedings on defendant's claim that the State impermissibly used its peremptory challenges to exclude males from the jury in violation of *JEB. v. Alabama ex. rel.* T.B. 511 U.S. 127, 114 S. Ct. 1419, 128 L.Ed.2d 89 (1986).

(5) Lester Gomez
Docket No. 99-2944 "L"
Crime Convicted: 2 counts Aggravated Rape (Plea)
Sentence: Life Imprisonment

The defendant, Lester Gomez, was the cousin of the live-in boyfriend of eight year old B.S.'s mother. The defendant stayed with B.S.'s family on weekends after returning from offshore work, sleeping in the same room as

victim B.S. On occasion, eight year old B.H. spent the night in B.S.'s room, giving the defendant access to both boys. The defendant used these occasions to fondle, anally rape, and orally copulate the boys. After several months, victim B.S. disclosed the incidents to his mother, who in return informed the mother of victim B.H. B.H. disclosed the abuse when confronted by his mother. Lester Gomez made a statement to police in which he denied abusing the victims, but advised that he was a bisexual male whose partner had died of the AIDS virus. The defendant contended that he had been tested for the virus in the past. Neither child tested positive for the AIDS virus.

On, May 7, 1999, the defendant was indicted on two counts of aggravated rape of a child under twelve. The case was instituted as a first class case, and prosecuted as a capital case. On February 6, 2001, the defendant withdrew his former pleas of not guilty, and entered a plea of guilty as charged on each count. The trial court sentenced the defendant to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence.

(6) State of Louisiana v. Daniel E. Dickerson
Docket No. 99-2946, Division "D"
Crime Convicted: Aggravated Rape
Sentence: Life
***State v. Dickerson*, 01-KA-1 287 (La. App. 5 Cir. 6/26/02) 822 So.2d 849; *writ denied* 02-K-2108 (La. 2121103) 837 So.2d 627**

In May of 1998, A.R, who is the victim's mother and the defendant's daughter, allowed three of her children, including D.R. and her then three-year-old twin siblings, to stay with her father and his live-in-girlfriend for the summer. D.R. was four years old when she went to stay with her grandfather and his girlfriend. She turned five-years-old on June 30, 1998.

While D.R. was staying at the defendant's house, he anally and vaginally raped her. D.R. testified that she was very afraid, and that it hurt when the defendant did that. Defendant told her that if she didn't tell anyone what had

happened, he would give her anything she wanted. If she did tell, he would "whup" her and not give her anything. Although she was afraid, D.R. told her older sister about the things defendant was doing to her. D.R.'s older sister told her mother, who later called the police. D.R. recounted the abuse to members of the Jefferson Parish Sheriff's Office, and in a videotaped interview with a forensic interviewer at the Children's Advocacy Center.

The State noticed its intent to seek a capital verdict in this matter. The jury found the defendant guilty as charged of aggravated rape of a juvenile under twelve on January 27, 2001. On January 29, 2001, the jury was unable to reach a unanimous verdict regarding sentencing. The trial court subsequently imposed a sentence of life imprisonment. The Louisiana Fifth Circuit Court of Appeal affirmed the defendant's conviction and sentence on appeal.

(7) Ronald Knightshed
Docket No. 99-3818 "0"
Crime Convicted: 1 count Aggravated Rape (Plea)
Sentence: Life Imprisonment

After observing a discharge in the six year old victim's bed, the victim's mother brought the victim, J.S., to the doctor. Tests were performed and the results were positive for gonorrhea. The victim, J.S. disclosed that her father, Ronald Knightshed touched her private part with his hand and with his private part, and that his private part was outside and inside her private part. He also sucked her private part with his mouth. These incidents occurred more than once on the same day.

In a taped statement, the defendant advised police that he came home drunk one evening and J.S. was upstairs because she was punished. He admitted to touching the victim's vagina with his finger, to licking her vagina, to inserting his penis into her vagina about a quarter of an

inch, and to rubbing his penis against her vagina until he ejaculated.

The defendant was charged by bill of indictment with aggravated rape of a juvenile under twelve. The case was instituted as a first class case, and prosecuted as a capital case. On September 5, 2000 the defendant withdrew his former plea of not guilty and entered a plea of guilty as charged.[2]

(8) Donald Washington
Case No. 98-5426 "F"
Conviction: Sexual battery
Sentence: Ten years
***State v. Washington*, 99-KA-1330 c/w 99- KA-1331 (La. App. 5 Cir. 5/17/00), 793 So.2d 574; *writ denied* 00-KO-1943 (La. 9/21/00) 797 So.2d 59**

Defendant was the boyfriend of the mother of victim B. When the defendant lived with them, he would enter her mother's bedroom where B. usually read before bedtime. The defendant would pull down her pants and "stick his penis in [her] booty." He did this to her more than once.

On September13, 1998, the defendant was charged by bill of indictment with the aggravated rape of a female juvenile under the age of twelve in case number 98-5426 of the docket of the 24" Judicial District Court. The defendant was separately charged by bill of indictment with the aggravated rape of two juveniles while armed with a

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[2] The defendant was separately indicted on a charge of aggravated oral sexual battery of J.S., a violation of La. R.S. 14:43.4, in case number 99-4933. On September 5, 2000, the defendant entered a plea of guilty as charged and was sentenced to twenty years imprisonment at hard labor concurrent with the sentence in case number 99-3818.

dangerous weapon in case number 98-5427. The victims in case number 98-5427 were B's fourteen year-old sister, Q, and Q's fourteen year-old friend, D.J. Although case number 98-5426 was instituted as a first class case, the State informed the trial court and the defendant on December 4, 1998, that it would not seek the death penalty in this matter.

Case numbers 98-5426 and 98-5427 were jointly tried by a jury on May 10 and 11, 1999. At the close of trial, the jury found the defendant guilty of the lesser offense of sexual battery of B. in case number 98-5426, and of the lesser offenses of forcible rape with respect to the charges involving Q and DJ. He was sentenced to 10 years imprisonment without benefit of parole, probation or suspension of sentence for sexual battery in case number 98-5426, and to forty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for each forcible rape conviction in case number 98-5427. The defendant was adjudicated a third felony offender, and re-sentenced on one of the forcible rape convictions to life imprisonment at hard labor, without benefit of probation, parole or suspension of sentence. The defendant's conviction was affirmed on appeal by the Louisiana Fifth Circuit Court of Appeal.

(9) Latroy Oates
Case No. 99-7044 "N"
Crime Convicted: Aggravated Rape (2 Counts)
Sentence Imposed: Life Imprisonment
***State v. Oates*, 01-KA-63 (La. App. 5 Cir. 5/30101) 796 So.2d 9[illegible] (Table); *writ denied*, *State v, Oates*, 01 (La. 6/14/02),817 So.2d 1150.**

D.L., an eight year-old-female, and her siblings went to spend time with their aunt and uncle, Latonya Oates and Joe Lee, while their mother worked. The house in Kenner was occupied by Oates, Lee, their two children, and a roommate, Chris Robinson. D.L. stayed their [*sic*] during July 1999. One bedroom of the two bedrooms in the Lee house was continually occupied by Oates and Lee. The other bedroom was occupied, alternatively, by Robinson

and the children. When the children visited and slept in the living room, Mr. Robinson slept in the second bedroom.

On July 10, 1999, and July 13, 1999, respectively, D.L. and her siblings were staying with her aunt and uncle in their house. On each of those nights, D.L was asleep when Ms. Oates' brother, Latroy Oates, knocked on the front door and Chris Robinson let him inside. Once inside, Mr. Oates picked up D.L. and took her to the kitchen where he placed her on the floor. He removed her clothes and, according to the victim, he "put his private part in her private part." On the first occasion that s occurred, D.L. began to cry and Latroy Oates covered her mouth. After each encounter, the child was instructed by defendant to go use the bathroom, which she did. Following the incident, the defendant left the house.

Within a week of the second assault, D confided in her ten-year-old cousin, D.K., about the two rapes. D.K. relayed this information to her aunt, Theresa Babineaux. Ms. Babineaux told the victim's mother, who reported the incident to the police. The victim subsequently identified the defendant as the perpetrator from a photographic line-up. A physical examination revealed irregularities in the victim's hymen, compatible with vaginal penetration.

On October 28, 1999, the defendant was charged by bill of indictment with two counts of aggravated rape of a juvenile under the age of twelve. The case was instituted as a first class case, and was initially prosecuted as a capital case. The State later determined that it would not seek the death penalty in this case. On September14, 2000, a twelve person jury found the defendant guilty as charged on both counts. The trial court sentenced the defendant to concurrent terms of life imprisonment at hard labor. The defendant's conviction was affirmed on appeal by the Louisiana Fifth Circuit Court of Appeal.

(10) Bernard Williams
Case No. 99-7488 "E"
Crime Convicted: Aggravated Rape
Sentence: Life imprisonment

***State v. Williams*, 05-KA-318 (La. App. 5 Cir. 1117/06) 921 So.2d 1033; *writ denied* 04-KO-0051 (La. 5/21104) 874 So.2d 171**

In November of 1999, while conducting an investigation into an allegation that the defendant forcibly raped an adult female acquaintance, Det. Michael Cunningham sought to interview the defendant's daughter, J.W., as a possible witness to the incident. J.W. disclosed to Det. Cunningham that her father had been sexually abusing her for years.

Trial in this matter was held July 13-16, 2004. J.W., who was fifteen years old at the time of trial, testified that she had previously resided with her father and a disabled aunt J.W. related that the defendant began using his hands and penis to touch her private parts when she was five years old. As she became older, the defendant began to place his penis halfway inside of her front and back "private parts" using Vaseline. On one incident, her babysitter, M.W. was sucking on Williams' "private part," and then he told both of them to take their clothes off. He put his mouth on their private parts, and inserted his penis into them both. This occurred more than once on the same evening. M.W., an admitted prostitute, confirmed the incident involving herself. She testified that Williams began having sex with her when she was sixteen years old.

The defendant was charged by bill of indictment with the aggravated rape of a juvenile under 12, with the bill of indictment indicating that it was a first class case. However, the State did not pursue the death penalty in this matter. On July 16, 2004, the jury returned a verdict of guilty as charged. Counsel waived all delays, and the defendant was sentenced to life in prison at hard labor, without benefit of parole, probation, or suspension of sentence. The Louisiana Fifth Circuit Court of Appeal affirmed the defendant's conviction and sentence on appeal.

(11) Bryan Cole
Docket No. 02-5357 "B"
Crime Convicted: 2 Counts of Aggravated Rape (Plea)

Sentence: Life imprisonment

On July 5, 2002, the Jefferson Parish Sheriff's Office was contacted following V.C.'s disclosure of sexual abuse by her father, Bryan Cole. Five year-old V.C., the victim of count one of the bill of indictment, was anally and vaginally raped by her father while on a camping trip which she took with him, her older sister, C.C., and their eleven year old friend, M.V. This incident was observed by C.C. and M.V. Bryan Cole also performed anal and vaginal intercourse on V.C. when she visited him at his residence, and placed vaseline on his penis which he then made her masturbate until he ejaculated. V.C. was examined at Children's Hospital where it was learned that she tested positive for gonorrhea.

M.V., the victim of the second count of the indictment, disclosed that Bryan Cole penetrated her rectum with his penis on an occasion when she spent the night with his daughters at his residence. M.V. also related that the defendant had her masturbate him with Vaseline until he ejaculated. This incident was observed by C.C.[3]

The defendant was indicted on two counts of aggravated rape of a juvenile under twelve. The case was prosecuted as a capital case. On November 14, 2003, the defendant withdrew his pleas of not guilty and entered pleas of guilty as charged to both counts of the indictment. The trial court imposed a sentence of life imprisonment at hard labor

---

[3] Bryan Cole was separately charged in case number 02-6005 of the docket of the 24 Judicial District Court with the non-capital aggravated rape of an adult female, with the non-capital aggravated rape of his six year old stepson, which occurred prior to the August 15, 1995 amendment authorizing the death penalty for the aggravated rape of a child under twelve, and aggravated incest of his juvenile, biological daughter C.C. He entered a plea of guilty as charged to all counts on November 14, 2003, and was sentenced to two consecutive terms of life imprisonment on the aggravated rape counts, and a concurrent sentence of twenty years on the aggravated incest count. The court ordered the sentences in case number 02-6005 to run concurrently with the sentences imposed in case number 02-5357 "B."

without benefit of parole, probation, or suspension of sentence on each count.

(This Case) Patrick Kennedy
98-1425 "0"
Conviction: Aggravated Rape
Sentence: Death

On March 2, 1998, the victim, eight year old L.H., lived with her mother, brother and her stepfather, Patrick Kennedy. That morning, the victim's mother left the house to go to work, leaving the victim in the home with her brother and the defendant. L.H. awoke in her bed to find the defendant on top of her. Her shorts and underwear had been removed. The approximately 300 pound defendant's clothes were off. He raped her with his private part, and her private part was bleeding when he was finished. The defendant covered her eyes with his hand while he was raping her with his private part. After L.H. observed that she was bleeding, she fainted. The defendant left her room and then returned carrying a cup of orange juice and some pills chopped up in it. The defendant brought the victim into a bathroom where she threw up in the bathtub. L.H. was later transported by ambulance to Children's Hospital where she underwent surgery to repair a deep laceration running from her front vaginal wall to her rectal area which was causing her rectal wall to bulge out.

After 9:00 a.m. on the morning of March 2, 1998, the defendant called 911 to report that his little girl had been raped. The defendant related to the dispatcher that the victim was in the garage when two boys grabbed her and pushed her and raped her. The defendant stated that he found the victim in a side yard by an empty house after he heard screaming. The defendant went on to relay information about the race of the perpetrators and to describe an individual he claimed to have seen outside. The victim later parroted the defendant's account of the incident.

Investigators noted discrepancies between the evidence at the scene and the defendant's account of the incident. Details of the incident changed as the defendant spoke to

investigators. Although the defendant did not report the rape until after 9:00 a.m., it was learned that as early as 6:30 to 7:30 on the morning of March 2, 1998, the defendant called the dispatcher at his place of employment to tell him that his daughter had become a young lady that morning, and to ask if he knew how to get blood out of a white carpet. At 7:37 that morning, the defendant called B&B Carpet Cleaning wanting to have blood stains cleaned from some carpets.

Eventually, the victim advised her mother that the defendant, Patrick Kennedy, was in fact the person who raped her. The defendant was charged by bill of indictment with the aggravated rape of a child under twelve. The State sought the death penalty in this matter. Trial in this matter commenced on August 8, 2003. On August 25, 2003, the jury found the defendant guilty as charged.

At the sentencing hearing, C.S. was called to testify by the State. The defendant was previously married to C.S.'s cousin. C.S. was eight or nine when she stayed with the defendant and her cousin for the summer. The defendant checked her out of school, brought her back to the house and had intercourse with her, then told her to tell her cousin that she had injured herself at school. C.S. did not pursue charges against the defendant. On August 26, 2003, the jury determined that the defendant should be sentenced to death, finding as aggravating circumstances that the offense occurred during an aggravated rape and that the victim was under twelve years of age. On October 2, 2003, the trial court sentenced the defendant to death.

Wherefore, the State respectfully submits the instant Capital Sentencing Memorandum in compliance with Louisiana Supreme Court Rule 28.

Respectfully Submitted,

/s/_____
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PETITIONER'S BRIEF

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7

No. 07-343

IN THE
Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari
to the Louisiana Supreme Court

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the crime of rape of a child with the death penalty.

2. If so, whether Louisiana's capital rape statute violates the Eighth Amendment insofar as it fails genuinely to narrow the class of such offenders eligible for the death penalty.

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JURISDICTION

The judgment of the Louisiana Supreme Court was entered on May 22, 2007. That court denied petitioner's timely petition for rehearing on June 29, 2007. Pet. App. 135a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

At all times relevant to this case, Section 14:42 of the Louisiana Revised Statutes provided in relevant part:

> A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent because it is committed under any one or more of the following circumstances:

* * *

(4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

* * *

D. (1) Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.

(2) However, if the victim was under twelve years, as provided by Paragraph (a)(4) of this Section:

(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment may be capital shall apply.

(b) And if the district attorney does not seek a capital verdict, the offender shall be punished by imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

Article 905.3 of the Louisiana Code of Criminal Procedure provides: "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed."

At all relevant times, Article 905.4 of the Louisiana Code of Criminal Procedure provided:

> A. The following shall be considered aggravating circumstances:
>
> (1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, or simple robbery.

(2) The victim was a fireman or peace officer engaged in his lawful duties.

(3) The offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.

(4) The offender knowingly created a risk of death or great bodily harm to more than one person.

(5) The offender offered or has been offered or has given or received anything of value for the commission of the offense.

(6) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony.

(7) The offense was committed in an especially heinous, atrocious or cruel manner.

(8) The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(9) The victim was a correctional officer or any employee of the Department of Public Safety and Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

(10) The victim was under the age of twelve years or sixty-five years of age or older.

(11) The offender was engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedule I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.

(12) The offender was engaged in the activities prohibited by R.S. 14:107.1(C)(1).

B. For the purposes of Paragraph A(2) herein, the term "peace officer" is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, commissioned wildlife enforcement agent, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

STATEMENT

Petitioner Patrick Kennedy is one of only two people in the United States on death row for a non-homicide offense, and the only one whose state court proceedings are final. He has been sentenced to die for the crime of rape – an offense for which no one in this country has been executed in almost half a century and for which this Court held in *Coker v. Georgia*, 433 U.S. 584 (1977), that capital punishment constitutes cruel and unusual punishment. A divided Louisiana Supreme Court nonetheless upheld petitioner's sentence – the majority asserting that there is a difference of constitutional magnitude between the rape of the sixteen-year-old at issue in *Coker* and that of a younger child.

1. In 1976, this Court invalidated a Louisiana death sentence for the offense of aggravated rape (there, the rape of two girls, one sixteen and one seventeen) on the ground that Louisiana law made such punishment mandatory for the offense. *Selman v. Louisiana*, 428 U.S. 906 (1976) (per curiam), *reversing in part State v. Selman*, 300 So. 2d 467 (La. 1974). The following year, this Court decided *Coker*, 433 U.S. 584, another case involving the rape of a sixteen-year-old. There, this Court held that regardless of whether state law makes capital punishment mandatory or discretionary, it constitutes cruel and unusual punishment for a state to impose the death penalty for the crime of aggravated rape not resulting in death. In response to these decisions, Louisiana and the handful of other states

with similar laws stopped pursuing death sentences in rape cases.

In 1995, the Louisiana Legislature recapitalized the crime of rape for cases in which the victim is less than twelve years old. *See* La. R.S. 14:42 (1995).[1] The law defines "rape" as "anal, oral, or vaginal sexual intercourse," *id.*, and "any penetration, however slight . . . is sufficient" to satisfy the statute. *State v. Self*, 719 So. 2d 100, 101 (La. Ct. App. 1998) (quotation omitted). The statute does not require proof of any use of force; the victim's age automatically establishes a lack of "lawful consent," and a "[l]ack of knowledge of the victim's age shall not be a defense." La. R.S. 14:42(A) & (A)(4). Finally, although the statute requires proof of an "aggravating circumstance" in order to trigger the death penalty, two such potential circumstances are (1) that the defendant raped a child and (2) that the victim was a child. La. C.Cr.P. arts. 905.3 & 905.4(1), (10).

2. Petitioner Patrick Kennedy is an African American man who is now forty-four years old. Although he has never been pronounced mentally retarded, his IQ has been measured at 70, which resides in the mentally retarded range, and he has only an eighth-grade education. Prior to the events at issue here, his only criminal convictions were for

---

[1] In 2003, after the crime at issue here, the Louisiana Legislature amended this law to substitute the phrase "under thirteen years" for "under twelve years." La. R.S. 14:42(A)(4) (2003) & (D)(2) (2006).

issuing five worthless checks between 1987 and 1992.

At 9:18 in the morning on March 2, 1998, petitioner called 911 to report that his eight-year-old stepdaughter, L.H., had just been raped. Petitioner told the 911 operator that after letting L.H. go play in the garage, he heard loud screaming and ran to discover her in the house's side yard. He told the operator that L.H. said that two teenage boys from the neighborhood dragged her into the yard from the garage and forcibly raped her. Petitioner added that he saw one of the boys and described him as being about eighteen years old and riding a blue ten-speed bike.

The police arrived shortly thereafter. Petitioner took the officers straight to L.H.'s bedroom, where he explained he had carried her after finding her in the yard. L.H. was bleeding from her vaginal area. She was taken to the hospital and underwent surgery. L.H.'s injuries to her genital area were severe, but a pediatric surgeon was able to repair the damage. Two weeks later, her physical injuries were healed. J.A. 48-49.

During this entire ordeal, and well afterwards, L.H. consistently told various investigating officers and doctors the same thing that petitioner had told the 911 operator – that two neighborhood boys had raped her. She also gave a highly detailed account of the incident in a three-hour interview with a psychologist and a social worker, describing exactly

how the boys had assaulted her and then fled by bicycle. Pet. App. 10a-11a.

The police quickly uncovered evidence that supported L.H.'s allegations. Within two days of the rape, they found a blue bicycle in tall grass behind a nearby apartment. The bike was the same style as one that petitioner identified the day before as resembling one ridden by the perpetrators. The bike did not have any gears, the tires were flat, and it was covered in spider webs. The police also found a black shirt matching the one that L.H. had said one perpetrator wore. Investigators linked both of these items to Devon Oatis – a large, tall black teenager who lived in the neighborhood and matched L.H.'s general physical description of the lead rapist. When officers interviewed Oatis, he lied to them about his whereabouts on March 2. In fact, he never provided a verifiable alibi. The police nonetheless decided to rule out Oatis as a suspect because they thought his bicycle was inoperable and because he appeared "heavy set," whereas L.H. had described her attacker as "muscular." Pet. App. 8a-10a.

Instead, the police increasingly turned their sights toward petitioner. As is often the case in child abuse investigations, the police had no direct evidence to substantiate their suspicions. But they interpreted blood on the underside of L.H.'s mattress as indicating that the rape had occurred in L.H.'s bedroom and that petitioner might have attempted to cover this up by turning over the mattress pad. A dispatcher at petitioner's employer also told the

police that on the morning of the rape, petitioner had called to say that he would not be coming to work that day because his daughter had "become a lady." And the owner of a carpet cleaning service said that petitioner had called that morning to schedule an urgent cleaning to remove bloodstains. L.H.'s mother, however, accepted L.H.'s account and denied to state authorities that petitioner could have abused L.H.

In mid-March, the State arrested petitioner and placed him in jail. Shortly thereafter, on April 7, 1998, the State Division of Child Protection Services removed L.H. from her mother's home. According to the investigating officer, the reason for the removal was that "Mrs. Kennedy believes the story that her daughter tells her about two strangers dragging her from the garage and raping her on the side of their house." Dft. Ex. K, Referral Form, at 4. Social workers explained that the State needed to "protect[] [L.H.] from these negative influences" by her mother and described "treatment" as being necessary because: "allegations of sexual abuse by step-father; mother is denying abuse; child has alleged other perpetrators, however evidence points to step-father." *Id.*, Quarterly Report, June 18, 1998, at 1. The State told Mrs. Kennedy that she could regain custody of her daughter when she learned to "be objective concerning evidence" of the rape – that is, when she told her daughter and the State that she believed petitioner committed the rape. *Id.* at 2.

Soon thereafter, Mrs. Kennedy began telling L.H. that she thought petitioner was the one who had raped her. She also told L.H. that it would be "okay" to tell people that petitioner had done this. Pet. App. 23a. On June 22, 1998, the State returned L.H. to her mother.

Police and social workers continued to monitor L.H.'s home environment. They also required Mrs. Kennedy and L.H. to attend state-sponsored "counseling sessions" overseen by one of the assistant district attorneys assigned to the case. Eventually, in a December 16, 1999 interview that the Sheriff's Office and the District Attorney's Office coordinated with the Child Advocacy Center – fully twenty months after the rape – L.H. told the State for the first time that petitioner was the one who had raped her. While being pressed for about fifteen minutes for details, L.H. was able to furnish only a few, claiming that petitioner had raped her early in the morning in her bed and that she then had fainted.

3. The State charged petitioner with capital rape in the judicial district court for Jefferson Parish.[2] Petitioner moved to quash the request for capital punishment on the ground that the Eighth Amendment prohibits such punishment for child rape. But the trial court denied that motion.

---

[2] This is the same parish in which the trial occurred in *Snyder v. Louisiana*, No. 06-10119, which is currently pending in this Court.

As the parties conducted discovery and prepared for trial, petitioner repeatedly demanded that the State turn over any physical evidence directly linking him to the crime. The State claimed to have such evidence. But instead of providing it, the State offered to take the death penalty off the table in exchange for petitioner's pleading guilty. Petitioner, however, refused this offer and steadfastly insisted on his innocence.

Shortly before trial was set to begin, petitioner obtained access to the victim's mattress for the first time. He submitted it for forensic testing, which revealed that the blood stains on the mattress did not match the blood type of either the victim or petitioner. When petitioner brought this to the attention of the trial court, the State asked for a continuance, explaining that it needed to change its theory of the crime:

> Mr. Rowan and I basically had a – not so much a theory, but we had a Trial strategy mapped out. This significantly changes that Trial strategy and the witnesses that we intended to call and the evidence that we had intended to present, and the focus that we had, that we intended to take as far as our case. This significantly alters that.

Tr. 2044 (1/14/02). The trial court granted the continuance.

When trial began in August of 2003, it was not easy to seat a jury. The trial court dismissed forty-four potential jurors because "they would not consider capital punishment either generally or for an offense of aggravated rape." Pet. App. 71a-72a & n.14; *see Witherspoon v. Illinois*, 391 U.S. 510 (1968). But after several days of voir dire, a twelve-person jury willing to sentence someone to death for child rape was finally selected.

Despite having performed its own exacting forensic analyses of the blood stains on L.H.'s mattress and elsewhere in her house, as well as investigatory medical tests on L.H. herself, the State did not introduce at trial any "positive evidence" linking petitioner to the rape. Pet. App. 14a. Instead, the State characterized its testing of the mattress as "inconclusive," and it sought to prove its case through circumstantial evidence and oral testimony. Pet. App. 93a. The "most important" such evidence was L.H.'s videotaped *ex parte* dialogue at the Child Advocacy Center, supported by her mother's testimony that L.H. also had told her that petitioner committed the rape. Pet. App. 14a. L.H. took the stand at trial, but she "evidently . . . lost her composure" and was never required to describe the rape to the jury. Pet. App. 15a.

Petitioner suggested to the jury that, consistent with L.H.'s initial and repeated claims, Oatis was the true perpetrator. But petitioner was unable to obtain Oatis' presence for questioning in court. Although the trial court, at petitioner's urging,

issued a subpoena for Oatis, he apparently had fled the state and could not be found.

The jury ultimately convicted petitioner of rape, and the case proceeded to sentencing. Following a short evidentiary hearing, the jury determined that petitioner should be sentenced to death on the basis of two of Louisiana's statutory aggravating factors: (1) "the offender was engaged in the perpetration or attempted perpetration of aggravated rape" and (2) "the victim was under the age of twelve years." Pet. App. 58a-61a (quoting La. C.Cr.P. art. 905.4(A)(1) & (10)). Summarily rejecting petitioner's arguments that imposing the jury's recommended sentence would violate the Eighth Amendment, the trial court sentenced petitioner to death.

4. The Louisiana Supreme Court affirmed petitioner's conviction. A majority of that court also upheld his sentence, adhering to its prior decision in *State v. Wilson*, 685 So. 2d 1063 (La. 1996), *cert. denied* 520 U.S. 1259 (1997), which had rejected a pre-enforcement challenge to the State's then-newly enacted capital rape law. Although this Court held in *Coker* that the Eighth Amendment prohibited imposing the death penalty for rape, the majority of the Louisiana Supreme Court distinguished *Coker* on the ground that the sixteen-year-old victim there was an "adult woman" and, therefore, that this Court "has not yet analyzed whether the rape of a child under twelve" is punishable by death. Pet. App. 43a & n.28, 48a. Freed from the compass of *Coker*, the majority turned to the two-part test that – in the

words of the Louisiana Supreme Court (Pet. App. 44a-45a) – a "bare majority" of "the prior Court" (that is, this Court before the appointments of its two "new members") formalized in *Roper v. Simmons*, 543 U.S. 551 (2005). That test requires a court: (1) to consider objective criteria indicating whether imposing the death penalty is cruel and unusual, and then (2) to exercise "independent judgment" concerning "whether the death penalty is a disproportionate punishment" under the circumstances at issue. *Id.* at 564.

In objective terms, the Louisiana Supreme Court acknowledged that only five states have statutes on the books that could even theoretically allow the death penalty to be imposed for child rape, and that the other four states' laws "are more narrowly drawn than Louisiana['s]," in that they all apply only to repeat offenders. Pet. App. 48-49. The court further acknowledged that no state in years (in fact, in over forty-three years) has executed anyone for any kind of rape. Pet. App. 37a. But instead of drawing from this evidence the inference that executing petitioner would constitute cruel and unusual punishment, the majority found that objective factors actually indicate that petitioner's sentence is constitutional. The majority asserted that the five states that have capital rape statutes embody a "compelling" "trend" toward allowing capital punishment for child rape. Pet. App. 55a. The majority also noted that nine additional states and the federal government have at least one law on the books allowing capital punishment for a non-homicide offense. Pet. App. 51a-55a.

Turning to the second prong of *Roper*'s test, the majority predicted, in light of *Coker*'s characterization of rape as "second only to homicide in the harm that it causes," that if this Court "is going to exercise its independent judgment to validate the death penalty for any non-homicide crime, it is going to be child rape." Pet. App. 55a.

The Louisiana Supreme Court also rejected petitioner's narrower Eighth Amendment argument that even if some rapes of child victims may be punished with the death penalty, Louisiana's capital rape law does nothing to guide juries in differentiating between child rapes that are deserving of capital punishment and those that are not. The court reasoned that even though two of the applicable aggravating facts that allow a jury to impose a death sentence simply duplicate elements of the child rape statute, the "underlying [child rape] statute itself" performs the constitutionally required narrowing function because only those who rape victims less than twelve years of age are subject to the death penalty. Pet. App. 57a-61a; *see also Wilson*, 685 So. 2d at 1072.

Chief Justice Calogero dissented. He reasoned that *Coker*'s holding – namely, that imposing the death penalty for rape violates the Eighth Amendment when the victim "d[oes] not die" – "retains its force undiminished today not only because the decision set out a bright-line and easily administered rule, but also because the 'abiding conviction' expressed in that decision . . . has served as the

wellspring of the Supreme Court's capital jurisprudence over the past thirty years since *Gregg* [*v. Georgia*, 428 U.S. 153 (1976)]." Pet. App. 133a-134a (quoting *Coker*, 433 U.S. at 598). Nothing in the "recent legislative enactments" in a handful of states, the dissent continued, warrants a departure from *Coker* and this Court's other rulings prohibiting the death penalty for person-on-person offenses not resulting in the death of the victim. Pet. App. 134a.

SUMMARY OF ARGUMENT

The death sentence imposed on petitioner constitutes cruel and unusual punishment in violation of the Eighth Amendment.

I. Punishing the crime of child rape with the death penalty cannot be squared with this Court's decision in *Coker v. Georgia*, 433 U.S. 584 (1977). There, six Justices agreed "that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life." *Id.* at 598 (plurality opinion) (quotation omitted). Subsequent decisions have made clear that capital punishment is categorically impermissible for person-on-person violence that does not result in death, and in which the offender does not attempt or intend to kill or display reckless indifference toward human life. The Louisiana Supreme Court had no warrant in this case to retreat from that well-settled rule.

Even if *Coker* and its progeny did not foreclose capital punishment here, the two-part test this Court

has articulated in recent Eighth Amendment cases would do so. First, objective indicia overwhelmingly show that society views capital punishment as excessive punishment for child rape. There are only two people on death row in this country for this offense, both in Louisiana. Forty-five states bar such punishment outright, and Louisiana is the *only state* that allows it when, as here, the defendant has no prior convictions for child sexual assault or rape. Furthermore, no one in America has been executed for any kind of rape in over forty-three years, and relevant international norms reinforce the democratic consensus against such punishment. Second, this Court's jurisprudence demonstrates that although rape is a very serious crime, no rapist should be punished more severely than the average deliberate murderer, who by definition is not subject to capital punishment. This is especially so in the context of *child* rape, which, both as a theoretical matter and as actually prosecuted in Louisiana, presents a particularly acute risk of wrongful conviction.

II. Even if it were permissible under some circumstances to impose the death penalty for child rape, petitioner's sentence would still violate the Eighth Amendment. This Court's jurisprudence requires capital sentencing statutes genuinely to narrow the class of death-eligible defendants in order to separate the most culpable offenders from others who have committed the same crime. But Louisiana's capital rape law contains no narrowing mechanism that can serve to differentiate

petitioner's case in any rational way from the many child rape prosecutions in the State in which the death penalty is neither sought nor imposed. Both of the aggravating factors the jury found here simply confirmed that the victim was a child and was raped. Yet those facts are true in the case of every defendant convicted of this crime. They cannot meaningfully differentiate petitioner from any other defendant convicted of capital rape.

ARGUMENT

I. The Eighth Amendment Bars Imposing the Death Penalty for Rape, Regardless of the Victim's Age.

A. This Court's Decision in *Coker v. Georgia* Precludes Capital Punishment for Any Rape in Which Death Does Not Result.

1. In *Coker v. Georgia*, 433 U.S. 584 (1977), this Court considered whether imposing the death penalty upon a thrice-convicted rapist violated the Eighth Amendment. The defendant, who had prior convictions for rape, murder, and kidnapping, broke into the home of Allen and Elnita Carver shortly after escaping from prison. Once in the home, he tied up Allen in the bathroom and proceeded to rape Elnita at knifepoint. Elnita was only sixteen at the time.

This Court held that the defendant's death sentence constituted cruel and unusual punishment. Justice White's plurality opinion began by noting that, in response to this Court's decision in *Furman*

v. Georgia, 408 U.S. 238 (1972), which required states to revamp their death penalty laws, only six had made any form of non-homicidal rape a capital offense. 433 U.S. at 594-95. The plurality then explained that:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. . . . The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond all repair. *We have the abiding conviction that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life.*

Id. at 598 (internal quotations, citations, and footnote omitted; emphasis added).[3]

The majority of the Louisiana Supreme Court asserted that *Coker* does not apply where the victim is under twelve because "children are a class of people that need special protection." Pet. App. 42a-43a, 48a, 57a (quotation omitted). It is true that even though the victim in *Coker* was sixteen, this Court referred to her as an "adult woman." But the

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[3] Citations to *Coker* from this point forward are to the plurality opinion unless otherwise indicated.

reasoning of *Coker* leaves no room for the Louisiana Supreme Court's hairsplitting. The *Coker* Court emphasized that no matter how aggravated, rape simply "does not compare with murder." 433 U.S. at 598. This basis for this distinction – that rape, unlike murder, "does not take [a] human life," *id.* – operates independent of the age of the victim. *See also id.* at 599 (emphasizing that even when rape is aggravated the crime does "not involv[e] the taking of life"). Accordingly, the four-Justice plurality, supported by two other Justices, flatly concluded that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape." *Id.* at 592; *see also id.* at 600-01 (opinions concurring in the judgment).

The other three Justices echoed the categorical nature of the Court's holding. Concurring in the judgment, Justice Powell explained that the lead opinion "holds that capital punishment *always* – regardless of the circumstances – is a disproportionate penalty for the crime of rape." *Id.* at 601 (opinion concurring in part and dissenting in part) (emphasis in the original). He further underscored that "the plurality draws a bright line between murder and all rapes – regardless of the degree of brutality of the rape or the effect upon the victim." *Id.* at 603.[4] The two dissenters observed that "[t]he

[4] Justice Powell agreed that Coker's sentence constituted cruel and unusual punishment but would have reserved the question whether the Eighth Amendment permitted capital punishment for "an outrageous rape resulting in serious, lasting harm to the victim." *Id.* at 604. Louisiana's statute does not require any such

clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim." *Id.* at 621 (Burger, C.J., dissenting).

Commentators and other authorities likewise understood *Coker* to preclude imposition of the death penalty for any rape in which the victim does not die. A report for Congress noted that "[a]lthough [*Coker*] states the issue in the context of the rape of an adult woman, the opinion at no point seeks to distinguish between adults and children." Congressional Research Serv., Library of Congress, The Constitution of the United States of America: Analysis and Interpretation 1402 n.18 (Johnny H. Killian & Leland E. Beck eds., 1987) (citation omitted). Law review articles echoed this assessment. *See, e.g.*, David C. Baldus et al., *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 Stan. L. Rev. 1, 4 (1980) (*Coker* "concluded that the death penalty is excessive per se in cases of rape.").

Prior to the decision in this case, both of the other state supreme courts to consider the constitutionality of post-*Coker* death sentences imposed for child rape agreed with this assessment as well. In *Buford v. State*, 403 So. 2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163 (1982) & 454 U.S. 1164 (1982), the Florida

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findings, and the State did not present any evidence of lasting harm to the victim. Accordingly, even under Justice Powell's view of the law, petitioner's sentence would violate the Eighth Amendment.

Supreme Court considered a death sentence imposed for the violent rape of a seven-year-old girl. The court explained: "The reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence to death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Buford*, 403 So. 2d at 951.

The Mississippi Supreme Court invalidated the only other post-*Coker* sentence imposed for child rape before Louisiana enacted its law at issue here. *See Leatherwood v. State*, 548 So. 2d 389 (Miss. 1989). At the relevant time, Mississippi's child rape law, read in tandem with its subsequently enacted aggravating circumstances statute, allowed rape to be punished by death when the offender also attempted or intended to kill the victim. Because there was no proof of such an attempt or intent in the case, the Mississippi Supreme Court vacated the sentence without addressing the constitutionality of a death sentence for child rape. *Id.* at 402-03. But two justices wrote separately to emphasize that they would have preferred to invalidate the child rape law insofar as it allowed the death penalty in the absence of the victim's death. *Id.* at 403 (Robertson, J., concurring). The concurring opinion reasoned that "[t]here is as much chance of the Supreme Court sanctioning death as a penalty for *any* non-fatal rape as the proverbial snowball enjoys in the nether regions." *Id.* at 406 (emphasis in original). The Mississippi Legislature subsequently amended its

law to forbid capital punishment for non-homicide rape. *See* Miss. Code § 97-3-65(3).

2. In the thirty years since *Coker*, this Court has reinforced *Coker*'s reasoning that person-on-person violence that does not involve killing or at least reckless disregard for human life does not warrant capital punishment. In *Eberheart v. Georgia*, 433 U.S. 917 (1977) (per curiam), decided on the same day as *Coker*, the Court held that imposing a death sentence for aggravated kidnapping violates the Eighth Amendment. Despite the fact that aggravated kidnapping is an entirely different crime than rape, the Court issued its ruling without any discussion, relying solely on its decision in *Coker*.

This Court relied again on the *Coker* rationale in *Enmund v. Florida*, 458 U.S. 782 (1982), invalidating the death penalty in a felony murder case. The defendant there had been sentenced to death for his participation in a robbery that ended in murder, even though the defendant "[did] not himself kill, attempt to kill, or intend that a killing take place or that lethal force . . . be employed." *Id.* at 797. This Court held that even though "robbery is a serious crime deserving serious punishment," the death penalty "is an excessive penalty for the robber who, as such, does not take human life." *Id.*; *see also Tison v. Arizona*, 481 U.S. 137, 157-58 (1987) (reaffirming *Enmund* and allowing the death penalty in felony murder cases when the defendant plays a major role

and displays "reckless indifference toward human life").[5]

3. This Court should not deviate from the dictates of *Coker* and its progeny. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [this Court is] bound." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996). Accordingly, when a "well-established rationale upon which the Court based the results of its earlier decisions" dictates a particular outcome, this Court should follow that rationale. *Id.* at 66-67; *see also County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and

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[5] State supreme courts, in the couple of instances in which the issue has arisen outside of the context of rape, have relied on the rule established in *Coker* and its progeny that capital punishment is excessive for non-homicidal person-on-person violence. *See People v. Hernandez*, 69 P.3d 446, 464-67 (Cal. 2003) (prosecution for conspiracy to commit murder: imposing the death penalty for a crime that "does not require the actual taking of human life would raise a serious constitutional question" because "[a]lthough the high court did not expressly hold [in *Coker*] that the Eighth Amendment prohibits capital punishment for *all* crimes not resulting in death, the plurality stressed that the crucial difference between rape and murder is that a rapist 'does not take a human life'" (quoting *Coker*, 433 U.S. at 598)); *State v. Gardner*, 947 P.2d 630, 653 (Utah 1997) (prosecution for aggravated assault against prison guard: "The *Coker* holding leaves no room for the conclusion that any rape, even an 'inhuman' one involving torture and aggravated battery but not resulting in death, would constitutionally sustain imposition of the death penalty.").

dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of prior cases, but also to their explications of the governing rules of law.").

That principle applies here. *Coker* and its progeny rest on the principle that person-on-person violent crime cannot justify capital punishment when death did not result and the perpetrator did not even intend or attempt to kill, or display reckless indifference toward human life. This rule does not necessarily mean that the death penalty can never be imposed for a non-homicide offense. The legislative history of federal laws that allow capital punishment for treason, espionage, air piracy, and mass drug importation explains that the death penalty is available in such cases because these crimes implicate national security or present grave risks to multiple human lives in ways that a single act of non-homicidal person-on-person violence does not.[6]

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[6] Legislators made clear when Congress reinstated the death penalty for espionage and instituted the death penalty for drug "kingpins" as part of the Federal Death Penalty Act of 1994 that they viewed those crimes as causing entirely different harms than rape. Senator Orrin Hatch noted that "the *Coker* plurality opinion stated that 'the rapist, as such, does not take human life.' In a real sense, a drug kingpin does take human life and causes untold violence, and the American people know it." 139 Cong. Rec. S15745-01, S15753 (Nov. 16, 1993). Referring to espionage, Senator Hatch explained: "I cannot think of a better instance where [the death penalty] should be enforceable than in those cases where a person sells out his or her country, and does so for a cheap profit by putting lives in jeopardy and causing the death of other people." 140 Cong. Rec. S1820-01

But the established rationale of *Coker* and its progeny clearly applies here and precludes the imposition of the death penalty for child rape.

It is true enough, as the Louisiana Supreme Court went out of its way to note, that this Court's substantive death penalty jurisprudence "has never been reconsidered or applied by the current Court and its new members." Pet. App. 45a. But this is not a sufficient reason for deviating from precedent. "Th[e] doctrine [of *stare decisis*] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). For over thirty years, courts, prosecutors, and lawmakers have relied on the "bright-line and easily administered" rationale of *Coker* and its progeny. Pet. App. 134a (Calogero, C.J., dissenting). This Court should not repudiate that rationale, inject uncertainty into the law, and extend the death penalty to an entirely new category of cases.

(Feb. 24, 1994). Indeed, in the last case in which a death sentence was imposed for espionage, the court observed that the offense was "worse than murder" because the defendants "turned over information to Russia concerning the most deadly weapon known to man [the nuclear bomb] thereby exposing millions of their countrymen to danger or death." *United States v. Rosenberg*, 109 F. Supp. 108, 110 (S.D.N.Y.), *aff'd*, 204 F.2d 688 (2d Cir. 1953).

B. The National Consensus Against Punishing Child Rape by Death Reinforces the Conclusion That Execution for This Offense Would Constitute Cruel and Unusual Punishment.

To any extent that *Coker* and its progeny do not already control here, this Court's recent Eighth Amendment jurisprudence confirms that petitioner's sentence constitutes cruel and unusual punishment. That jurisprudence requires a two-part analysis: (1) "a review of the objective indicia of consensus"; and (2) "exercise of [this Court's] own independent judgment." *Roper v. Simmons*, 543 U.S. 551, 564 (2005). Each of these inquiries reinforces the conclusion that petitioner's sentence cannot stand.

1. In assessing whether imposing capital punishment comports with objective indicia of legitimacy, this Court looks to (a) the number of states that prohibit the death penalty for the offense at issue; (b) the "[]frequency of its use even where it remains on the books"; and (c) the direction of any change with respect to punishing the crime at issue. *Roper*, 543 U.S. at 567; *Atkins v. Virginia*, 536 U.S. 304, 313-16 (2002). This Court also has "recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual." *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988) (plurality opinion); *accord Roper*, 543 U.S. at 575-78. Each of these factors militates against permitting capital punishment here.

a. The critical question for purposes of surveying states is to what extent jurisdictions beyond the one at hand would allow a defendant such as petitioner to be put to death. In *Enmund*, for example, this Court found that "only eight jurisdictions authorize[d] the imposition of the death penalty" for the crime at issue (vicarious felony murder) under the circumstances of Enmund's case. 458 U.S. at 789. This Court noted that nine other states provided that "a vicarious felony murderer may be sentenced to death . . . absent an intent to kill." *Id.* at 791. But this Court did not count those additional states because – unlike the state in which Enmund was convicted – each precluded capital punishment "absent aggravating circumstances above and beyond the felony murder itself." *Id.* at 792. This Court concluded that the existence of only eight states in which the death penalty was available "weigh[ed] on the side of rejecting capital punishment for the crime at issue." *Id.* at 793.

Subsequent decisions have refused to find a sufficient consensus in favor of capital punishment when even more states would have allowed the death penalty in the case at hand. In *Roper* and *Atkins*, this Court held that the Eighth Amendment barred executing juvenile and mentally retarded offenders, respectively, even though twenty states allowed each practice. *Roper*, 543 U.S. at 564-67; *Atkins*, 536 U.S. at 314-17.

The situation here is far more stark: Louisiana is the *only* state in which petitioner could be executed

for the crime for which he was convicted. Only four other states even have statutes on the books authorizing the death penalty for child rape: South Carolina, Oklahoma, Montana, and Texas. Each of these statutes restricts the availability of capital punishment to situations when a defendant has a prior conviction for sexual battery or rape of a child; two of them also require a defendant to have served at least a twenty-five year sentence for such an offense, further limiting the availability of the death penalty as a possible punishment.[7] Louisiana's law

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[7] *See* S.C. Code Ann. § 16-3-655(C)(1) (2006 Supp.) (child rape when defendant previously has been convicted of sexual battery of a child, which carries a minimum twenty-five-year sentence, and jury finds aggravating circumstance beyond defendant's record and age of child); 10 Ok. St. Ann. § 7115(I) (2006 Supp.) (child rape or lewd molestation when defendant previously has been convicted of such an offense); Mont. Code Ann. § 45-5-503 (enacted 1997) (child rape when defendant previously has been convicted of the same crime); Texas Pen. Code § 12.42 (2007 Supp.) (child rape when defendant has previously served at least a 25-year sentence for the same crime). Because none of these statutes has been invoked to sentence a person to death, no court has considered whether any of them is constitutional. The Louisiana Supreme Court claimed that a Georgia statute, enacted in 1999, also allows child rape to be punished by death. Pet. App. 49a. But the Supreme Court of Georgia explained years ago that "[s]tatutory rape" – its term for any kind of rape of a child – "is not a capital crime in Georgia." *Presnell v. State*, 252 S.E.2d 625, 626 (Ga. 1979). The Georgia Legislature's 1999 redrafting of its statutory rape provision did nothing more than clarify an ambiguity in the law's substantive scope. *See State v. Lyons*, 568 S.E.2d 533, 535-36 (Ga. App. 2002).

requires no record of recidivism, and petitioner has no such prior conviction.

The Louisiana Supreme Court insisted that the situation is actually "more complex" because nine other states and the federal government have statutes allowing capital punishment "for other non-homicide crimes which are far less heinous" than child rape. Pet. App. 49a-54a.[8] It is puzzling to assert that crimes for which various jurisdictions authorize *more severe* punishment than child rape are actually "far less heinous" offenses.

In any event, the Louisiana Supreme Court's observation is merely makeweight. Five of the laws the court referenced relate to offenses posing grave threats to national security (treason, espionage, and air piracy);[9] two relate to kidnapping when the

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[8] In fact, only seven of the nine states the Louisiana Supreme Court referenced have laws authorizing capital punishment for non-homicide offenses The court cited South Dakota's kidnapping and Florida's drug kingpin statutes. But the maximum sentence for kidnapping in South Dakota is life imprisonment. *See* S.D. Codified Laws § 22-19-1 (aggravated kidnapping is class B felony) & § 22-6-1 (maximum sentence for class B felony is "life imprisonment"). The Florida drug kingpin statute allows extensive drug importation to be punished by death, but only when the offender "knows that the probable result of such importation would be the death of any person." Fla. Stat. Ann. § 893.135(1)(b)(3).

[9] *See* Ark. Code Ann. § 5-51-201 (Michie 1997); Cal. Penal Code § 37 (West 1999); Miss. Code Ann. §§ 97-7-67, 97-25-55 (West 2003); N.M. Stat. Ann. § 20-12-42 (Michie 1989); Wash. Rev. Code Ann. § 9.82.010 (West Supp. 2006). Several other states

victim has not been released alive;[10] and one relates to the mass importation of drugs.[11] Those crimes are so vastly different than the offense at issue here that this Court in *Coker* had no need even to survey states' punishments for them. *See Coker*, 433 U.S. at 593-96; *see also Enmund*, 458 U.S. at 793 & n.15 (rejecting dissent's attempt to enlarge survey beyond the particular "crime at issue"). Nothing has changed in that respect. *See supra* at 20-21 n.6. Furthermore, none of those jurisdictions has imposed a single death sentence for any of these crimes in over forty-three years. Consequently, whatever the legal status of those various capital punishment statutes, they provide no cover for the State here.[12]

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not mentioned by the Louisiana Supreme Court have similar laws. *See, e.g.*, Ga. Code Ann. §§ 16-5-44, 16-11-1 (West Supp. 2007); 720 Ill. Comp. Stat. 5/30-1 (West Supp. 2007).

[10] Colo. Rev. Stat. § 18-3-301 (capital punishment permissible "if the person kidnapped was [not] liberated alive prior to the conviction of the kidnapper"); Idaho Code § 18-4502, 4504 (capital punishment permissible if "the kidnapped person has [not] been liberated unharmed" at time of imposition of sentence). Montana has a similar statute, Mont. Code Ann. § 45-5-303, but is already included in the Louisiana Supreme Court's count by virtue of its child rape statute.

[11] 18 U.S.C. § 3591(b)(1).

[12] To the extent there is any utility in surveying statutes outside of those establishing punishment for child rape, the national trend of treating sex offenders as mentally ill and civilly committing them for mandatory medical treatment would be far more informative than reviewing how states

b. The exceptionally infrequent use of the death penalty to punish child rape further illustrates the national consensus against such punishment. This Court stated in *Enmund* that "[s]ociety's rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made." 458 U.S. at 794. In particular, the Court observed that only 3 of 739 inmates on death row for whom sufficient data were available were sentenced to die for conduct like the defendant's. *Id.* at 795. In *Atkins*, this Court concluded that the practice of executing mentally retarded offenders "ha[d] become truly unusual, and it [was] fair to say that a national consensus ha[d] developed against it" because only five states over seventeen years had executed offenders with an IQ less than 70. 536 U.S. at 316. In *Roper*, this Court emphasized that "even in the 20 states without formal prohibition on executing juveniles, the practice [was] infrequent. . . . In the past 10 years, only three ha[d] done so . . . ." 543 U.S. at 564-65 (2005).

No one in America has been executed in over forty-three years for any kind of rape, a period stretching back more than a dozen years before *Coker*. Furthermore, even though Louisiana's child rape statute has been on the books for twelve years, and four other states currently have capital rape statutes, petitioner

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punish crimes like treason and air piracy. *See generally Kansas v. Crane*, 534 U.S. 407, 414 (2002); *Seling v. Young*, 531 U.S. 250, 264 (2001) (upholding potentially permanent civil commitment).

is one of only two people in the United States actually to receive a death sentence under one of these statutes. There are currently over 3300 people on death row in America, and petitioner is one of only two who did not commit murder. Death Penalty Information Center, *Facts About the Death Penalty* 2 (2008). The other offender is Richard Davis, whom the State of Louisiana convicted in late 2007 of child rape. *See State v. Davis*, Case No. 00262971.

Prosecutorial practices confirm that society views the death penalty as disproportionate to the offense of child rape. This Court noted in *Enmund* that a lack of prosecutorial vigor in pursuing the death penalty "would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive." 458 U.S. at 796. The State of Louisiana has initiated over 180 prosecutions for child rape since the 1995 law at issue here went into effect. *See* J.A. 12-13. To the best of petitioner's knowledge, the State, in *every one* of these cases, has offered the defendant the opportunity to plead guilty in exchange for a sentence of life imprisonment. As far as petitioner is aware, prosecutors have sought the death penalty at trial only five times.

c. Contrary to the Louisiana Supreme Court's suggestion, Pet. App. 55a, there exists no discernible trend away from this longstanding national consensus. Juries have returned death sentences in child rape prosecutions in only two cases over the past dozen years. Such punishment remains a freak-

ish exception to the typical sentence of imprisonment imposed in the thousands of similar cases across the country each year.

It is true, as the Louisiana Supreme Court noted, that "even after [this Court's decision] in *Coker*, five states nevertheless have capitalized child rape." Pet. App. 54a.[13] Yet over the same thirty-one year period, the two states that had capital child rape statutes prior to *Coker* have disallowed the death penalty for the crime. *See* Miss. Code § 97-3-65(3); *Welsh v. State*, 850 So. 2d 467, 468 n.1 (Fla. 2003). Furthermore, since *Coker*, at least six other state legislatures have rejected such proposed legislation out of hand.[14] The willingness of state legislatures to

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[13] As noted above, the four state laws besides Louisiana's all reserve the possibility of capital punishment for cases in which the defendant has a prior conviction for sexual assault or rape of a child. *See supra* at 23-24 & n.7. These statutes may evince a greater concern with recidivism than the crime of child rape itself. *See, e.g., Ewing v. California*, 538 U.S. 11, 24 (2003) (noting that recent three strikes legislation "responded to widespread public concerns about crime by targeting the class of offenders who pose the greatest threat to public safety: career criminals").

[14] Those six states are Alabama, California, Pennsylvania, Tennessee, Virginia, and Utah. Bills in five states failed to get out of committee. *See* H.B. 335, Regular Sess. (Al. 2007); AB 35, Regular Sess. (Cal. 1999); H.B. 2779, Regular Sess. (Pa. 2005); H.B. 2924, Regular Sess. (Tenn. 2006); S.B. 271, Regular Sess. (Va. 1998). A provision capitalizing child rape in a bill proposed in Utah similarly failed to make it out of committee, *see* H.B. 86, Regular Sess. (Ut. 2007), even though the

vote down death penalty legislation represents a substantial condemnation of the proposals, "[g]iven the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime." *Atkins*, 536 U.S. at 315; *see also California Department of Corrections v. Morales*, 514 U.S. 499, 521 (1995) (noting the "national trend toward 'get-tough-on-crime' legislation") (Stevens, J., dissenting).

In any event, whatever movement might be said to exist here is not nearly as forceful as the one this Court found inconsequential in *Coker*. There, this Court noted that "the most marked indication" of society's view of capital punishment for a certain offense at that time was "the legislative response to [its 1972 *Furman* decision]." *Coker*, 433 U.S. at 594 (quotation omitted). During the five year period after *Furman*, six states enacted capital rape statutes (three of which made the death penalty *mandatory* for the offense). *Id.* at 594-95. This Court was unmoved.

d. International norms reinforce the unacceptability of imposing capital punishment for child rape. This Court noted in *Coker* that only three out of 60 "major nations in the world" allowed the death penalty for any kind of rape in which death did not result. 433 U.S. at 596 n.10. Today, no Western nation authorizes the death penalty for any kind of

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remainder of the bill eventually became law. *See* H.B. 86 (3rd substitute), Regular Sess. (Ut. 2007).

rape. Only a sliver of the countries admitted to the United Nations does so, the most prominent being China, a country that also allows capital punishment for tax evasion and other economic and nonviolent offenses. *See* Br. *Amici Curiae* of Leading British Law Associations et al.; Peter D. Nestor, *When the Price Is Too High: Rethinking China's Deterrence Strategy for Robbery*, 16 Pac. Rim L. & Pol'y J. 525, 538 (2007). The handful of other countries that Louisiana seeks to have the United States join in authorizing the death penalty for non-homicide rape include Saudi Arabia and Egypt, which authorize such punishment for reasons rooted at least partly in the subjugation of women.[15]

Since *Coker*, the United States also has become a signatory to the American Convention on Human Rights (ACHR), Article 4(2) of which provides that the death penalty "shall not be extended to crimes to which it does not presently apply." ACHR: Pact of San José, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144

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[15] Saudi Arabia, Egypt, United Arab Emirates, Nigeria, and Jordan, all of which allow the death penalty for rape, appear to derive their criminal codes from Shari'a, which also subjects individuals to the death penalty for blasphemy, apostasy, adultery, prostitution and homosexuality. *See, e.g., Gay Nigerians Face Sharia Death*, BBC News, Aug. 10, 2007, *http://news.bbc.co.uk/2/hi/africa/6940061.stm*. In some countries, under Shari'a, survivors of rape are themselves subjected to significant corporal punishment. *See, e.g., Rape Case Calls Saudi Legal System Into Question*, MSNBC, Nov. 21, 2006, http://www.msnbc.msn.com/id /15836746; Dan Isaacs, *Court in Nigeria Spares Woman from Stoning*, Daily Telegraph, Mar. 26, 2002, at 4.

U. N. T. S. 146 (entered into force July 19, 1978) (cited in *Roper*, 543 U.S. at 576). Thus, not only does Louisiana's death penalty for child rape isolate it on both the national and world stages, but it is at odds with an international treaty.

2. This Court's jurisprudence demonstrates that it independently views the death penalty as excessive punishment for the crime of child rape. This Court has "identified 'retribution and deterrence of capital crimes by prospective offenders' as the social purposes served by the death penalty." *Atkins*, 536 U.S. at 319 (quoting *Gregg*, 428 U.S. at 183).

"With respect to retribution . . . the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 536 U.S. at 319. The Court already has expressed in *Coker* its own "abiding conviction that the death penalty, which is 'unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life." *Coker*, 433 U.S. at 598 (quoting *Gregg*, 428 U.S. at 187). In so holding, *Coker* refused to accept "the notion . . . that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer" in the average murder case, who by definition is not subject to the death penalty. *Coker*, 433 U.S. at 600; *see also Roper*, 543 U.S. at 571 (independently concluding that the death penalty is excessive when a defendant's culpability is less than that of "the average murderer").

With respect to deterrence, the only empirical study of Louisiana's capital child rape statute concluded that it has "little impact on variables associated with deterrence." Angela D. West, *Death as Deterrent or Prosecutorial Tool? Examining the Impact of Louisiana's Child Rape Law*, 13 Crim. Just. Pol'y Rev. 156, 184 (2002). Because capital cases require more time to prosecute than non-capital cases, "passing the [capital rape statute] has increased the burden of prosecuting a defendant," thereby encouraging prosecutors to reduce charges in serious rape cases. *Id.* at 185. The result is that "prosecutors now work harder for defendants to be punished less harshly than before the amendment." *Id.* Several child advocacy and victim support groups also assert that whatever additional deterrence might theoretically result from equalizing the prescribed punishment for child rape and murder is more than offset by removing the disincentive for sex offenders to kill their victims. *See* Br. of the Nat'l Assoc. of Social Workers et al.

Finally, this Court noted in *Atkins* that imposing the death penalty is inappropriate when the type of prosecution at issue presents "a special risk of wrongful execution." 536 U.S. at 321. In child rape cases, the risk of wrongful conviction is especially pronounced. Child testimony is subject to suggestibility in ways that adult testimony is not. *See*, Charles Brainerd & Peter A. Ornstein, *Children's Memory for Witnessed Events*, in The Suggestibility of Children's Recollections 14-19 (John Doris, ed. 1991). Children are also uniquely subject to

pressures from state social services agencies. As this case vividly demonstrates, such agencies have the power to encourage a child to tell a certain story – indeed, to name a certain perpetrator – on pain of being placed in foster care. *See supra* at 8. Moreover, the prosecution, as here, frequently lacks any "positive evidence" linking the defendant to the charged crime. Pet. App. 14a. The upshot of these and other evidentiary hydraulics is that child rape prosecutions "are 'he said, she said' cases that ultimately rely on the jury's assessment of the relative credibility of opposing witnesses" and "it is virtually impossible for the jury not to make an occasional credibility mistake." *Ex Parte Thompson*, 153 S.W.3d 416, 422 (Tex. Crim. 2005) (Cochran, J., concurring).

This risk of wrongful execution is exacerbated by the practices of Louisiana prosecutors in child rape cases. That Louisiana prosecutors invariably offer child rape defendants the opportunity to plead out to life imprisonment means that the death penalty is a genuine possibility only for those defendants who maintain their innocence and insist upon a trial. Thus, those defendants most likely to be innocent of child rape are also the ones most likely to be subject to the death penalty. *Cf. United States v. Jackson*, 390 U.S. 570, 583 (1968) (eliminating capital punishment from the Federal Kidnapping Act, which could be applied only if the defendant demanded a jury trial, because the statute "tend[ed] to discourage defendants from insisting upon their innocence and demanding trial by jury"). The Eighth Amendment

should not sanction the expansion of the death penalty to this new category of cases.

II. Louisiana's Capital Rape Law Does Not Genuinely Narrow the Class of Offenders Eligible for the Death Penalty.

Even if it were permissible under some circumstances to punish child rape by death, Louisiana's law would still violate the Eighth Amendment because it fails to differentiate between child rapes that are deserving of capital punishment and those that are not.

At the heart of every death penalty case is the question of how a jury will exercise its "discretion . . . on a matter so grave as the determination of whether a human life should be taken or spared." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion) (quotation omitted). Accordingly, this Court has long made clear that:

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be imposed in a way that obviates standardless [sentencing] discretion.

Id. at 428 (quotation omitted and second alteration in original). A capital punishment scheme, in other

words, "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of [the crime at issue]." *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *accord Arave v. Creech*, 507 U.S. 463, 474 (1993); *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988); *Godfrey*, 446 U.S. at 428-29; *Gregg*, 428 U.S. at 189-95 (joint opinion of Stewart, Powell, and Stevens, JJ.).

When capital punishment statutes lack clear and effective narrowing mechanisms, not only do such statutes fail to separate the truly worst offenders from others but they open the door to the pernicious influence of race discrimination and other invidious considerations. *Furman*, 408 U.S. at 249-51 (Douglas, J., concurring); *see also Graham v. Collins*, 506 U.S. 461, 496-97 (1993) (Thomas, J., concurring) ("For 20 years, we have acknowledged the relationship between undirected jury discretion and the danger of discriminatory sentencing – a danger we have held to be inconsistent with the Eighth Amendment."). Racial prejudice is "the paradigmatic capricious and irrational sentencing factor," *id.* at 484, and standardless capital statutes pose "an unacceptable risk that a sentencer will succumb to either overt or subtle racial impulses or appeals."

Tuilaepa v. California, 512 U.S. 967, 992 (1994) (Blackmun, J., dissenting).[16]

States generally fulfill their constitutional obligation to guard against this and other types of "bias or caprice," *Tuilaepa*, 512 U.S. at 973 (majority opinion), by requiring juries in capital cases to find some "aggravating circumstance" intended to distinguish the defendant from others convicted of the same death-eligible offense. *Id.* at 971-72. An aggravating circumstance must "provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." *Godfrey*, 446 U.S. at 427 (alteration in original and quotation omitted). "If the sentencer fairly could conclude that an aggravating circum-

[16] To appreciate the possibility that race discrimination will metastasize in any vagaries of Louisiana's law, one only has to look at the nation's history of capital rape prosecutions. The practice originated in the antebellum South, where blacks were hanged (and often lynched) for raping white women; "[n]o white rapists are known to have been hanged." Stuart Banner, The Death Penalty: An American History, 139 (2002). Even during the mid-twentieth century period ending with the last execution in this country for rape in 1964, over 89% of those executed for rape were black, while blacks and whites were executed for murder in almost identical numbers. United States Dep't of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, Capital Punishment 1930-1967, at 7 (Aug. 1969). All fourteen rapists Louisiana executed during the 1940's and 1950's were black. *See* Burk Foster, *Struck by Lightning: Louisiana's Electrocutions for Rape in the Forties and Fifties*, The Angolite, Sept./Oct. 1996, at 36. *See generally* Br. of the American Civil Liberties Union and NAACP Legal Defense Fund.

stance applies to *every* defendant subject to the death penalty, the circumstance is constitutionally infirm." *Arave*, 507 U.S. at 474; *see also Zant*, 462 U.S. at 873-80 (state law invalid if it fails to delineate a "subclass" of death-eligible offenders); *Godfrey*, 446 U.S. at 428-29 (aggravating circumstance invalid because sentencer "could fairly characterize almost every murder" as satisfying it).

That is precisely the situation here. Louisiana law at the time of this crime classified rape of a "victim [who] is under the age of twelve years" as capital rape, La. R.S. 14:42(A)(4) & (D)(2)(a) (it now says under thirteen years), and provides that a death sentence may be imposed if the jury finds that "at least one statutory aggravating circumstance exists." La. C.Cr.P. art. 905.3; *see also* Pet. App. 59a. Yet the only two aggravating facts that the jury found in this case were (1) that "the offender was engaged in the perpetration or attempted perpetration of aggravated rape" and (2) that "the victim was under the age of twelve years." La. C.Cr.P. art. 905.4(A)(1) & (10); *see* Pet. App. 59a. The first aggravating factor simply restates the crime of conviction, and the second simply restates one of its elements. The jury's discretion regarding whether to sentence petitioner to death thus was not limited in any way.

The Louisiana Supreme Court nevertheless held in a pre-enforcement challenge that the State's capital rape sentencing scheme could legitimately operate in this manner. The court reasoned that because "[t]he class of offenders is limited to those who rape a child

under the age of twelve[,] . . . not every rapist will be subject to the death penalty." *State v. Wilson,* 685 So. 2d 1063, 1072 (La. 1996), *cert. denied* 520 U.S. 1259 (1997). But this analysis misses the point entirely. Given that the death penalty is not a constitutionally available punishment for raping an adult, *see Coker,* 433 U.S. at 598-600, the only fact that could conceivably make a perpetrator of rape death-eligible in the first place is that the victim was a child.

What is more, the class of defendants subject to prosecution for child rape is extremely large. There are roughly 45,000 reports per year of sexual abuse of children under twelve, triple the amount of reported murders.[17] And Louisiana law defines child "rape" in terms that sweep in almost all variations of such abuse. The law captures all "anal, oral, or vaginal sexual intercourse," La. R.S. 14:42(A), and "[a]ny penetration, however slight . . . is sufficient" to satisfy the statute. *State v. Self,* 719 So. 2d 100, 101 (La. Ct. App. 1999) (quotation omitted). The statute does not require proof of any use of force. The

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[17] In 2004, the most recent year for which statistics are available, 45 states reported more than 40,000 cases of sexual abuse of victims under 12. *See* U.S. Dep't of Health & Human Servs., *Child Maltreatment 2004* tbl.3-11 (2006), http://www.acf.hhs.gov/programs/cb/pubs/cm04/table3_11.htm. The 50 states reported 17,357 murders during that same period. Hsiang-Ching Kung et al., Nat'l Center for Health Statistics, *Deaths: Preliminary Data for 2005* tbl.2 (2005), http://www.cdc.gov/nchs/data/hestat/prelimnarydeaths05_tables.pdf#1 (reporting data from both 2004 and 2005).

victim's age automatically establishes a lack of "lawful consent," and a "[l]ack of knowledge of the victim's age shall not be a defense." La. R.S. 14:42(A) & (A)(4).

The predictable result of this situation is that prosecutors will refuse to seek, and juries will refuse to impose, the death penalty in the vast majority of child rape prosecutions. And since the statutory scheme does not provide any "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not," *Godfrey,* 446 U.S. at 427 (alteration in original and quotation omitted), the death sentences meted out once every several years are bound to be "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman,* 408 U.S. at 309 (Stewart, J., concurring).

The Louisiana Supreme Court also suggested that petitioner's sentence was valid because it comported with this Court's holding in *Lowenfield v. Phelps*, 484 U.S. 231 (1988). *See* Pet. App. 60a-61a. In *Lowenfield,* the defendant was convicted of murder with the intent "to kill or inflict great bodily harm upon more than one person," 484 U.S. at 233 (quoting La. R.S. 14:30(A)(3)), and the jury sentenced him to death based on the aggravating circumstance that the crime "risk[ed] death or great bodily harm to more than one person," *id.* at 235 (quoting La. C.Cr.P. art. 905.4(d)). This Court held that "the fact that the aggravating circumstance duplicated one of

the elements of the crime d[id] not make this sentence constitutionally infirm." *Id.* at 246.

As numerous courts have recognized, however, *Lowenfield* is limited to situations in which the element or elements of the crime that are duplicated themselves perform the constitutionally required act of "narrowing the class of death-eligible [offenders]." *Id.* at 244-46; *see also United States v. McCullah*, 76 F.3d 1087, 1108 (10th Cir. 1996), *cert. denied* 520 U.S. 1213 (1997) ("Under *Lowenfield*, an aggravating factor that does not add anything above and beyond the offense is constitutionally permissible" only if "the statute itself narrows the class of death-eligible defendants."); *McConnell v. State*, 102 P.3d 606, 621 (Nev. 2004) (aggravating factor that duplicates element of offense is permissible only when offense itself is "narrow enough that no further narrowing of death eligibility is needed once the defendant is convicted"); *State v. Young*, 853 P.2d 327, 352 (Utah 1993) (duplicative aggravating circumstance is permissible only when substantive capital offense "narrows the class of offenders subject to the death penalty during the guilt phase of the trial"). That is not the case here. Assuming rape can ever be punished by death, the fact that the victim was a child makes petitioner only minimally death eligible – the least culpable type of offender subject to capital punishment. Consequently, the age of the victim does not appropriately narrow the large class of death-eligible defendants convicted of rape.

The infirmity of Louisiana's law is borne out by the very fact that petitioner and Richard Davis are the only two people out of over 180 prosecuted in the State who have received death sentences for child rape. Petitioner is a black man whose only criminal history prior to this case was passing some bad checks. He was convicted of committing a single act of rape. Although the rape, as is "very often" the case, was "accompanied by physical injury," *Coker*, 433 U.S. at 597-98, the victim's physical injuries fully healed in two weeks. J.A. 48-49. Richard Davis was convicted of repeated sexual interactions with his victim, but those interactions apparently lacked any physical force or trauma. Loresha Wilson, *Death for Rapist: Jury Says Man Should Die for Assaulting 5-Year-Old,* Shreveport Times, Dec. 13, 2007, http://www.shreveporttimes.com/apps/pbcs.dll/article?AID=/20071213/NEWS03/712130320/1062/ NEWS03.

There is no reason why these two cases should be separated so profoundly from the scores of others across the State over the last several years – let alone from the thousands per year across the country. The State of Louisiana recently has prosecuted dozens of capital rape cases in which defendants raped younger victims; committed multiple offenses (both in terms of assaulting several victims and the same victim multiple times); and inflicted more severe injuries. J.A. 13-27.[18] Yet not

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[18] For example, one defendant "was convicted of raping and attempting to kill his fellow church congregant's eleven-year-old daughter. As she screamed during the rape he stabbed her

one of these offenders received a death sentence. Indeed, in at least forty cases since the enactment of Louisiana's capital rape law, the State has convicted people of *killing* children; none of these offenders received a death sentence either. J.A. 13, 35-45.

As the Louisiana Supreme Court itself has acknowledged, an "inference of arbitrariness [arises] if a jury's recommendation of death [is] inconsistent with sentences imposed in similar cases from the same jurisdiction." *State v. Sonnier*, 380 So. 2d 1, 7 (La. 1979). Here, where juries in child rape cases in Louisiana are not required to find a single aggravating circumstance beyond the elements of the crime of child rape itself, and where the elements themselves do not perform the required narrowing, the arbitrariness in the sentencing system is palpable. It is too much for the Eighth Amendment to tolerate.

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multiple times. . . . When the girl regained consciousness, [the defendant] slashed her throat." J.A. 14. He was sentenced to fifty years for attempted murder and twenty-five for rape. *Id.* Another defendant "repeatedly rap[ed] three girls, one of whom was his daughter. The ages of the little girls at the time of the rape were five, seven, and nine." J.A. 15. Even though the defendant knew that he was HIV positive when he committed the rapes, he was not sentenced to death. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be reversed.

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RESPONDENT'S BRIEF

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PATRICK KENNEDY,

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v.

LOUISIANA,

Respondent.

On Writ Of Certiorari To The Louisiana Supreme Court

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the offense of rape of a child with the death penalty.

2. If so, whether Louisiana's capital rape statute genuinely narrows the class of such offenders eligible for the death penalty.

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OPINIONS BELOW

The May 22, 2007 decision of the Louisiana Supreme Court is reported at 957 So.2d 757 (La. 2007). Pet. App. 1a-65a. An appendix to the opinion of the Louisiana Supreme Court is unreported. Pet. App. 66a-132a. The dissent of Chief Justice Pascal Calogero is reported at 957 So.2d 757, 794 (La. 2007). Pet. App. 133a-134a.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on May 22, 2007. That court denied petitioner's timely petition for rehearing on June 29, 2007. Pet. App. 135a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

As relevant to petitioner's case,[1] Section 14:42 of the Louisiana Revised Statutes provided in pertinent part as follows:

> A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> . . .
>
> (4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.
>
> . . .
>
> D. (1) Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.
>
> (2) However, if the victim was under the age of twelve years, as provided by Paragraph A(4) of this Section:

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[1] La. Rev. Stat. Ann. § 14:42 (1997). In 2001, the introductory paragraph of La. R.S. 14:42(A) was amended to include oral sexual intercourse in the definition of rape. 2001 La. Acts 301, § 1. In 2003, the Louisiana Legislature amended La. R.S. 14:42(A)(4) and (D)(2) to substitute the phrase "under thirteen years" for the phrase "under twelve years." 2003 La. Acts 795, § 1.

> (a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. art. 782 relative to cases in which punishment may be capital shall apply.
>
> (b) And if the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

At all relevant times,[2] Article 905.4 of the Louisiana Code of Criminal Procedure provided:

> A. The following shall be considered aggravating circumstances:
>
> (1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting,

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[2] In 2006, the Louisiana Legislature amended La. C.Cr.P. art. 905.4 A(1) to add "second degree robbery," and "cruelty to juveniles, second degree cruelty to juveniles, or terrorism." 2006 La. Acts 86, § 1.

armed robbery, first degree robbery, or simple robbery.

(2) The victim was a fireman or peace officer engaged in his lawful duties.

(3) The offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.

(4) The offender knowingly created a risk of death or great bodily harm to more than one person.

(5) The offender offered or has been offered or has given or received anything of value for the commission of the offense.

(6) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony.

(7) The offense was committed in an especially heinous, atrocious or cruel manner.

(8) The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(9) The victim was a correctional officer or any employee of the Department of Public

Safety and Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

(10) The victim was under the age of twelve years or sixty-five years of age or older.

(11) The offender was engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedule I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.

(12) The offender was engaged in the activities prohibited by R.S. 14:107.1(C)(1).

B. For the purposes of Paragraph A(2) herein, the term "peace officer" is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, commissioned wildlife enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

STATEMENT OF THE CASE

In 1995, the Louisiana Legislature amended the penalty provision of Section 14:42 of the Louisiana Revised Statutes to provide that the rape of a child under twelve years of age shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the sentencing jury.[3] Patrick Kennedy is the first person to be convicted and sentenced to death pursuant to this provision.[4]

1. On May 7, 1998, a Jefferson Parish grand jury returned an indictment charging Kennedy with one count of aggravated rape of a child under twelve, a capital offense, in violation of La. R.S. 14:42. Petitioner received "a vigorous pre-trial defense, during which defense counsel filed approximately 50 substantive motions and sought six supervisory writs." Pet. App. 2a. A jury was selected on August 8, and 11-15, 2003. Pet. App. 2a. Opening statements commenced immediately after jury selection and trial continued through August 25, 2003, on which date the jury returned a verdict of guilty of aggravated

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[3] 1995 La. Acts 397, § 1.

[4] Subsequent to the Louisiana Supreme Court's decision affirming petitioner's conviction and death sentence on appeal, a Louisiana jury convicted Richard Davis of aggravated rape of a child under twelve and returned a death sentence. *State v. Davis*, Case No. 262,971, Caddo Parish, Louisiana. Davis is presently awaiting formal imposition of sentence by the trial court.

rape. Pet. App. 2a. The penalty phase was held on August 26, 2003, and the jury unanimously decided that the defendant should be sentenced to death after finding the following aggravating circumstances: 1) the offender was engaged in the perpetration of an aggravated rape; and 2) the victim was under the age of twelve years.[5]

2. The testimony and evidence presented during the guilt phase of petitioner's trial are recounted in the opinion of the Louisiana Supreme Court (Pet. App. 3a-24a) and summarized below:

At 9:18 in the morning on March 2, 1998, Patrick Kennedy called 911 to report that his eight year-old stepdaughter, L.H. had just been raped. Kennedy advised the 911 operator that L.H. said she had been dragged from her garage to the side yard by two neighborhood boys who then raped her. Kennedy claimed to have seen one of the boys riding away from the house on a bicycle. However, a sheriff's deputy who immediately responded to the complaint from a location only a block away from the defendant's residence, did not see anyone fleeing on a bicycle. The deputy, who arrived on the scene while the defendant was still talking to the 911 operator, noticed that the crime scene in the yard was inconsistent with a rape having occurred there: a dog was sleeping undisturbed nearby and only a small patch of coagulated blood was found in otherwise undisturbed long grass.

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[5] La. C.Cr.P. art. 905.4.

The defendant led the deputy to the victim's bedroom, where she was lying on the bed in her room, wearing a t-shirt, and wrapped in a bloody cargo blanket. The defendant, who was wiping his hands with a bloody towel, advised the deputy that he had previously placed the victim in the bathtub in order to clean her, after carrying her like an infant from the side-yard to the residence. The deputy noticed that the defendant had no blood on his clothes. The deputy also noticed that when he attempted to question the victim, the defendant tried to answer the questions for her. L.H. eventually indicated that she was selling Girl Scout cookies in the garage with her younger brother when two boys dragged her from the garage and one raped her.

When EMS arrived at the residence, Kennedy was found with a basin filled with water which he was using to wipe off L.H.'s genital area. When EMS field supervisor Stephen Brown told him to stop, Kennedy removed the basin, but returned to the room when Brown attempted to question the victim about what happened in order to determine what medical procedures were necessary. Kennedy intervened and provided an account of the incident in the victim's presence.[6]

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[6] Later, when the lead investigator interviewed the victim at the hospital, the defendant was present and prompted the victim to include that the attacker had an earring, and that they had seen the him cutting grass in the neighborhood previously.

L.H. was transported to Children's Hospital, where she underwent emergency surgery to repair a vaginal injury which had resulted in profuse bleeding. A laceration to the left wall of her vagina had separated her cervix from the back of her vagina, causing her rectum to protrude into her vagina. Additionally, L.H.'s perineum was torn all the way from the posterior fourchette, where the vagina normally ends, to the anus.

Detectives assigned to investigate the offense caused the neighborhood to be canvassed for a suspect and a bicycle Kennedy described in statements to detectives. A detective took Kennedy to a local K-Mart in an attempt to locate a bicycle similar to the one he described. However, Kennedy picked out a regular bike with straight handlebars as a similar bicycle, when he had originally described a ten-speed bicycle with the handle bars turned up. On March 3, 1998, Detective Florida Bradstreet interviewed the defendant in connection with her discovery of a bike belonging to sixteen year-old Devon Oatis. The blue, gearless bicycle was found in tall grass behind the apartment where Oatis resided. It was described by Det. Bradstreet as covered with spider webs, rusted, with flat tires, and inoperable. It appeared to have been there for some time as the grass underneath it was indented and dead. The defendant positively identified this bicycle as the one on which he saw the subject ride away. Contrary to his earlier description of the bicycle, before he identified a similar bicycle at K-Mart, this bicycle was not a ten-speed with handle

bars turned up, but was a regular bicycle with straight handlebars. Oatis was later ruled out as a subject because his physical description did not match those given by the victim and defendant and because his bicycle was inoperable.

In the meantime, the victim continued to relate that two boys on a bicycle pulled her from the garage and one of them raped her in the yard. Dr. Benton testified that medical records showed that the victim told all hospital personnel this same version of the rape while she was at the hospital, but that she told one family member that the defendant raped her. In addition, several days after the rape, the victim was interviewed by psychologist Barbara McDermott, and the videotaped interview was introduced by the defense at trial. This interview lasted for three hours over two days.[7] During the interview, the victim said she was playing in the garage with her brother when she was approached by a boy who asked her about Girl Scout Cookies. After a long delay, she said she fell off a ledge at the end of the garage and the boy pulled her by the legs across the concrete into the neighbor's yard with the other boy following them. She was trying to grab the grass while he was dragging her. The boy then pulled down his pants and her shorts, placed his

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[7] The Louisiana Supreme Court describes the McDermott interviews in detail in its opinion on direct appeal from conviction. Pet. App. 10a-11a. The first day was devoted primarily to collecting personal and familial history, while the victim was questioned about the rape on the second day. Pet. App. 10a, n.11.

hand over her mouth, and "stuck his thing in [her]." Pet. App. 11a. She forgot what both boys looked like and did not remember what either boy had on, though she thought one had on a black shirt and blue jeans. She did not remember anything after that until the ambulance arrived. Dr. McDermott questioned the victim thoroughly and argumentatively on each element of the victim's story, telling the victim her story did not make sense. For example, Dr. McDermott asked the victim why she did not suffer abrasions from being dragged across concrete by her legs, and asked her why she did not scream if the attacker's hand was not placed over her mouth until they reached the neighboring yard.

Despite the victim's version of events, the focus of the investigation began to shift toward the defendant. On March 4, 1998, the police learned about calls the defendant made to his employer on March 2, 1998, hours before he called 911. Alvin Arguello, chief dispatcher for the A. Arpet Moving Co., Patrick Kennedy's employer, testified that when he arrived for work on the morning of March 2, 1998, which was generally around 6:15 a.m., there was a message from Kennedy indicating he would not be available to work that day. Kennedy called Arguello again between 6:30 and 7:30 a.m., sounding nervous, to ask him how to get blood out of a white carpet. Kennedy told Arguello

that his step-daughter "had just become a young lady."[8]

On March 9, 1998, the police found out that Kennedy called B&B Carpet Cleaning at 7:37 a.m. on March 2, 1998 to request urgent carpet cleaning to remove blood stains, almost two hours before he called 911 to complain that the victim had just been raped. Rodney Madere, owner of B&B Carpet Cleaning, testified at trial that the defendant, whom he identified by caller ID, called him at 7:37 a.m. on March 2, to schedule an urgent carpet cleaning job to remove bloodstains. A photograph of the caller ID box from B&B Carpet Cleaners was introduced at trial. Lester Theriot, an employee of B&B testified that Madere called him before 8:00 on the morning of March 2, 1998, and told him to report immediately to the defendant's home, but he did not get there until after he dropped his son off at school. When he arrived, he could not get into the home because the police and an ambulance were present.

These calls indicated that the rape occurred much earlier in the morning than reported by the defendant, that he had waited several hours before calling 911, and that he was attempting to clean up evidence of the crime in the meantime. The police also became aware of physical evidence that the

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[8] Arguello testified that he could not recall whether Kennedy said his niece or his daughter had "become a young lady." Rec. Vol. 19, p. 4738.

crime scene had actually been cleaned. Pursuant to search warrants issued on March 4, 5, 7, and 8, 1998, luminol testing presumptively established the presence of blood on carpeting in areas of the home as reflected in photographs and sketches introduced at trial. A large area of carpet at the foot of the victim's bed was identified in this manner, and a stain was observed on the subfloor following the removal of the carpet and padding. Police also found a one gallon jug container labeled "SEC Steam Low Foam Extraction Cleaner" in the garage, and a pail and two towels were recovered from the bathroom sink.

Samples of several of these items from these locations were subsequently tested by Drs. Henry Lee and Michael Adamowicz of the Connecticut State Police Forensic Science Lab in 1998. Dr. Lee testified that liquid dilution demonstrated that someone had attempted to clean bloodstains from some of the carpet samples. Dr. Adamowicz found the victim's DNA on some carpet samples, the cargo blanket, and a towel.

Dr. Lee also testified regarding the absence of evidence confirming the defense's theory that the victim was raped in the yard as she initially stated. He examined the shirt and shorts the victim was wearing for any grass or soil stains but could not find any, indicating that the victim was not dragged through the grass as she initially claimed. He also did not find any abrasion marks consistent with being dragged. He opined that blood staining on the back of the victim's shorts was consistent with the shorts

being placed on the victim after she was raped. He also examined the victim's underwear and found a blood transfer stain on the back of them and did not find any grass or soil stains on them. He examined photographs of the crime scene outside and found nothing to indicate that a struggle had taken place, as there were no depressions in the grass and only a small blood stain sitting on top of the grass, indicating a low velocity dripping, suggesting that the blood had been planted there.

The victim's mother, C.H., testified at trial that she married the defendant in 1998. After the rape, the victim was removed from her custody for approximately one month because she had permitted the defendant, who was in jail, to maintain phone contact with the victim. C.H. testified that soon after the victim was returned to her custody, the victim for the first time reported to her mother that defendant had raped her.[9] She testified that the victim was in

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[9] The victim's mother denied telling people that she was afraid that L.H. would be taken from her if L.H. did not change her story, and denied telling the wife of one of Kennedy's friends that the police wanted the victim to change her story. Rec. Vol. 22, p. 5386. In brief, petitioner references Division of Child Protection Services records pertaining to the victim as "Dft. Ex. K." Pet. Brief at p. 6. These documents were not introduced at trial, nor did petitioner call any employee of the Department of Social Services to the stand to testify regarding the content of these records. In fact, the respondent can find nothing in the record indicating that these documents were introduced as a defense exhibit in any proceeding in the trial court. Instead, it appears that the copy of these documents contained in the third

(Continued on following page)

the room she shared with her younger brother, crying as her mother had never seen her cry before. After she allowed the victim to come sleep in her room, the victim told her that she could not hold it in anymore, and that that the defendant was the one who raped her.

The victim, who was eight when raped and nearly fourteen years old at the time of trial, testified that she woke up to find Kennedy on top of her. The victim testified that she was interviewed by Amalee Gordon on December 16, 1999. The defense stipulated to the admissibility of the videotape of this interview, which was played for the jury. On the videotape, the victim states that she woke up one morning and Kennedy was on top of her. He raped her, saw that she was bleeding, and called the police after informing her that she had better tell them the story he made up. The victim could not recall what the story was. She stated that it happened in her room, on her

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box of exhibits to the State appellate record is that which the Department of Social Services produced to the trial court under seal and for *in camera* review at the petitioner's request. Rec. Vol. 5, pp. 568-569. Having reviewed the records, the trial court ordered that the state and defendant be provided full and complete copies of the same. Rec. Vol. 3, pp. 576-577. The trial court obtained a written receipt for the copies from counsel for the State and the defendant. Rec. Vol. 3, p. 577. The other documents in the third box of exhibits to the record and labeled "A" through "M" include jury questionnaires, jury polling slips, the Uniform Capital Sentencing Report, and other *subpoena duces tecum* returns to the trial court. *See*, Rec. Vol. 1, Exhibit Index at p. 7.

bed, with the defendant's hand covering her eyes, while her shorts were off and the defendant was naked. After she was raped, the victim said she fainted and did not remember anything until the ambulance arrived to take her to the hospital.

After this videotape was played, the victim remained on the stand and testified on direct and cross-examination. The victim testified that she originally said two black boys raped her, but that this wasn't true. She said Kennedy told her to say this. She was not downstairs, in the garage, or outside of the house when the rape occurred. After Kennedy raped her, he left the room and returned carrying orange juice with pills chopped up in it. He gave it to her. She recalled hearing him on the phone telling his boss that his daughter had become a young lady and he couldn't come to work. She also recalled the defendant carrying her into the hall bathroom, where she threw up in the tub. The police came to the house, and she was taken to the hospital where she was given medicine that put her to sleep.

On cross-examination, the victim testified that she remembered telling police and people at the hospital that someone else did this to her, that after the rape the defendant did not live with them anymore. Also, she had to leave her mother and brother and go live with another family for awhile. This was upsetting to her, and she first told her mother that the defendant was the one that raped her right before the interview with Amalee Gordon.

3. In the capital sentencing phase of the trial, the State presented the testimony of S.L. Pet. App. 24a. The defendant was previously married to S.L.'s cousin and godmother, C.S., and S.L. spent the summer with defendant and C.S. when she was eight or nine years-old. S.L. testified that the defendant sexually abused her three times, the first time involved inappropriate touching, and the last time involved sexual intercourse. She did not tell anyone until two years later, and did not pursue legal action because of pressure from her family.

4. Kennedy's conviction and sentence were affirmed by the Louisiana Supreme Court on direct appeal. Of significance, the court held that the death penalty is not a constitutionally disproportionate punishment for the rape of a child under twelve years old, and rejected Kennedy's claim that Louisiana's capital sentencing scheme fails to genuinely narrow the class of death eligible offenders. Pet. App. 37a-61a.

Previously, in *State v. Wilson*, 685 So.2d 1063, *cert. denied, Bethley v. Louisiana,* 520 U.S. 1259 (1997), the Louisiana Supreme Court upheld the constitutional validity of the death penalty for the aggravated rape of a child under twelve in the context of a pretrial appeal by the state from the granting of a motion to quash. The Louisiana Supreme Court interpreted this Court's decision in *Coker v. Georgia*, 433 U.S. 584 (1977) as clearly precluding the death penalty as punishment for the rape of an adult woman, but as leaving open the question of whether child rape or other non-homicide crimes can be constitutionally

punished by death. Pet. App. 42a-43a. Considering the fact that "children are a class that need special protection," the Louisiana Supreme Court concluded in *Wilson* that "given the appalling nature of the crime, the severity of harm inflicted on the victim, and the harm imposed on society, the death penalty is not an excessive penalty when the victim is a child under the age of twelve years old." Pet. App. 42a (quoting *Wilson*, *supra*, at 1070).

Called upon in *Kennedy* to decide the issue in the context of a case where, for the first time, a defendant (the petitioner) had been convicted and sentenced to death, the Louisiana Supreme Court applied the two-part test recently used by this Court in *Atkins v. Virginia*, 536 U.S. 335 (2002) (Eighth and Fourteenth Amendments prohibit execution of mentally retarded person), and *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth and Fourteenth Amendments prohibit execution of individuals who were under eighteen years of age at the time of their crimes). Pet. App. 44a-45a.

First, the Louisiana Supreme Court reviewed "objective indicia of consensus, as expressed in particular by the enactments of legislatures addressing this question." Pet. App. 44a-45a (quoting *Roper*, 543 U.S. at 564). Whereas Louisiana was the only State with an effective statute authorizing the death penalty as punishment for the rape of a child under twelve years old at the time of this Court's decision in *Wilson*, *supra*, in the intervening years, four more states (Oklahoma, South Carolina, Montana, and Georgia) had passed laws to authorize the death

penalty as punishment for the rapes of young children. The court acknowledged that these laws were more narrowly drawn than Louisiana's capital rape law, as they required proof of a previous conviction for sexual assault of a child to render the offender death eligible. Pet. App. 49a.

The court also considered objective indicia suggesting that "there may be no consensus one way or the other on whether death is an appropriate punishment for any crime which does not result in the death of the victim." Pet. App. 54a. Citing commentators' conclusions that the number of jurisdictions allowing the death penalty for non-homicide offenses had "at least doubled between 1993 and 1997," the court conducted a review of State death penalty provisions and determined that 38% of capital jurisdictions authorize some form of non-homicide capital punishment. Pet. App. 54a.

The Louisiana Supreme Court found the direction of change toward the death penalty for child rape constituted a compelling trend. The court stated,

> [I]t is likely that ambiguity over whether *Coker* applies to all rape or just adult rape has left other states unsure of whether the death penalty for child rape is constitutional. These states may just be taking a "wait and see" attitude until the Supreme Court rules on the precise issue.

Pet. App. 55a.

Exercising its independent judgment, the Louisiana Supreme Court affirmed its decision in *Wilson*, *supra* at 1076, that the death penalty was not a disproportionate penalty for the rape of a child under twelve. Pet. App. 57a. Children are a class of people who need special protection as they are immature and not capable of defending themselves. Rape of a child under twelve is a crime like no other, and a "maturing society" has recognized "the degradation and devastation of child rape, and the permeation of harm resulting to victims of rape in this age category. The damage a child suffers as a result of rape is devastating to the child as well as to the community." Pet. App. 57a (footnote omitted).

The Louisiana Supreme Court also rejected petitioner's claim that Louisiana's capital sentencing procedures failed to genuinely narrow the class of child rapists eligible for the death penalty, citing this Court's determination in *Lowenfield v. Phelps,* 484 U.S. 231 (1988), that "Louisiana's capital scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and exercise of discretion. The Constitution requires no more." Pet. App. 61a, citing *Lowenfield*, *supra*, at 246. The court found this reasoning applies to Louisiana's sentencing scheme for capital rape. Pet. App. 60a.

Chief Justice Pascal Calogero dissented. Citing this Court's decisions in *Coker v. Georgia*, 433 U.S. 584 (1977), and *Eberheart v. Georgia*, 433 U.S. 917 (1977), he reasoned that the Eighth Amendment

precludes capital punishment for any offense that does not involve the death of the victim, with the possible exception of *sui generis* crimes against the state involving espionage or treason. Pet. App. 133a-134a.

SUMMARY OF THE ARGUMENT

The death penalty is not cruel and unusual punishment for the rape of a child. It is evident that societal awareness of the prevalence of child sexual abuse has increased tremendously in the last few decades. Moreover, public outrage over the sexual violation of immature young children by predatory adults is extremely great due to the recognition that these offenders target and harm the most vulnerable members of our society.

While this Court in *Coker* found that the death penalty was excessive for the rape of an adult woman, it has not found the death penalty to be excessive for all non-homicide crimes, or for all rapes. Objective indicia reflect that there is currently a significant trend to provide the death penalty as punishment for at least some rapes where the victim is a child. Seven states have legislation providing the death penalty for child rape, and of those States, only Florida's statute has been invalidated by its state supreme court. Three other states are presently considering legislation which would authorize the death penalty as punishment for the rape of a child committed

under certain circumstances. Additionally relevant to a determination of societal consensus with regard to authorizing the death penalty for this non-homicide offense, are the fifteen capital jurisdictions (including the federal government) that authorize the death penalty for a variety of non-homicide offenses, and the recent widespread enactment of "Megan's Laws," which require sex offenders to register and provide notification to the community. Juries have returned death sentences in two of the five cases in Louisiana in which it is known that the issue was submitted to a jury. In other states, the laws are so recently enacted that the fact that no one has yet been capitally convicted in those states does not demonstrate that juries are unwilling to impose the death penalty for the rape of a child. Therefore, objective indicia confirm that a current trend strongly supports imposition of the death penalty for this exceedingly grave offense. The State respectfully submits that legislative consideration of this issue should not be prematurely foreclosed.

Finally, Louisiana's capital child rape statute narrows the class of offenders who are subject to the death penalty. As applicable to Patrick Kennedy, the statute narrowly defined the offense to limit the death penalty to those offenders who anally or vaginally rape children eleven years of age or younger (children under twelve).

ARGUMENT

I. The Death Penalty is Not Cruel and Unusual Punishment for the Rape of a Child Under the Eighth Amendment.

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. It is well established that the Eighth Amendment's prohibition of cruel and unusual punishments is "progressive, and . . . not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 366-67 (1910). "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). A punishment is excessive and unconstitutional under the Eighth Amendment if it: (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeful and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

In *Gregg*, this Court held that the death penalty was not a constitutionally excessive punishment for deliberate murder, but reserved the question of the constitutionality of the death penalty when imposed for other crimes. *Id.* at 187 n.35. That question, with respect to child rape, is now before the Court.

A. This Court's Decisions in *Coker v. Georgia* and its Progeny Have Not Established a Categorical Rule Limiting Capital Punishment to those Offenses Resulting in Death.

1. One year after its decision in *Gregg*, this Court held that the death penalty was an excessive and unconstitutional punishment for the rape of an adult woman. *Coker v. Georgia*, 433 U.S. 584 (1977).[10] The plurality did not discount the seriousness of rape as a crime, finding that "[s]hort of homicide, it is the 'ultimate violation of self.'" *Id.* at 597. Rape was described as "highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established." *Id.* While rape was described as a violent crime, normally involving force or the threat of force to

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[10] *Coker* was decided by this Court in a plurality opinion. Justice White announced the judgment of the Court, joined by Justice Stewart, Justice Blackmun, and Justice Stevens. Justice Brennan and Justice Marshall filed separate concurring opinions finding the death penalty to be cruel and unusual punishment in all circumstances. Justice Powell concurred in the judgment in part and dissented in part, finding that death is disproportionate punishment for the crime of raping an adult woman where, as in *Coker*, the crime was not committed with excessive brutality and the victim did not sustain serious or lasting injury. Chief Justice Burger dissented, joined by Justice Rehnquist, concluding that he would leave to the States the task of legislating in this area of the law.

overcome the victim's will or capacity to resist, it was noted that it did not by definition include even serious injury to another person. *Id.* at 597-598. The plurality stated: "Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." *Id.* at 598.

However, the plurality was describing the rape of an adult. As noted in the Louisiana Supreme Court's opinion in *State v. Wilson*, 685 So.2d 1063, *cert. denied, Bethley v. Louisiana*, 520 U.S. 1259 (1997), there are fourteen separate references to the rape of an "adult woman" contained in the *Coker* plurality opinion, concurring opinion, or dissenting opinion.[11] In stating the issue before this Court and announcing the plurality's judgment, the *Coker* plurality opinion explicitly referred to the offense in question as the rape of an "adult woman."[12] Although this Court noted that two jurisdictions (Tennessee and Mississippi) provided capital punishment when the victim was a child, it was in the context of emphasizing the fact that Georgia was the only jurisdiction in the United States which, at that time, authorized a sentence of

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[11] *Wilson, supra*, at 1066, n.2.

[12] The plurality stated: "That question [the constitutionality of the death penalty], with respect to the rape of an adult woman is now before us." *Coker*, 433 U.S. at 593. The plurality concluded: "Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman." 433 U.S. at 584.

death when the rape victim was an adult woman. *Coker*, 433 U.S. at 595-596. It is therefore apparent that the plurality in *Coker* refrained from deciding whether the death penalty is grossly disproportionate for the rape of a child.

Louisiana is not the only state supreme court to interpret *Coker* as limited to the constitutionality of the death penalty for the rape of an adult woman. In *Upshaw v. State*, 350 So.2d 1358 (Miss. 1977), the Mississippi Supreme Court held that death is a constitutionally permissible punishment for the rape of a female child under the age of twelve years.[13] Its decision, rendered just four months after this Court's decision in *Coker*, rested in part upon a finding that this Court had taken great pains in *Coker* to limit its decision to the constitutionality of the death penalty for the rape of an adult woman, citing the multiple references to the rape of an "adult woman" in the plurality opinion. *Upshaw*, 350 So.2d at 1360.[14]

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[13] The Mississippi Supreme Court's discussion of the facts in the *Upshaw* opinion reflects that the eight-year-old victim did not die, and does not suggest that the victim was seriously injured apart from the rape. *Upshaw*, 350 So.2d at 1359-1360.

[14] In *Leatherwood v. State*, 548 So.2d 389 (Miss. 1989) the Mississippi Supreme Court subsequently reversed a conviction and sentence of death for the rape of a child under twelve years of age due to the erroneous admission of hearsay evidence. The Mississippi Supreme Court held that on retrial, the maximum sentence available would be life imprisonment because the aggravating factors set forth in Miss. Code Ann. § 99-19-1010 precluded the imposition of the death penalty. Although two justices wrote separately to state that they would have preferred

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Upshaw's conviction and death sentence were reversed on procedural grounds. *Upshaw v. State*, 350 So.2d at 1361-1362.

Most recently, in *State v. Velazquez*, No. S07G1012, 2008 WL 480078 (Ga. 2/25/08), the Georgia Supreme Court rejected the argument that *Coker* precludes the imposition of the death penalty for the rape of a child. The Georgia Supreme Court held that Velazquez, who pled guilty to the 2005 rape and aggravated sodomy of his seven year-old step-daughter, could not be sentenced to life imprisonment without possibility of parole because the State had not supplied any notice under the Uniform Rules of the Superior Courts that it intended to seek the death penalty.[15]

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to hold that the death penalty may not be imposed for the rape of a child consistent with the Eighth Amendment to the Constitution of the United States, the majority found it unnecessary to address this issue. In 1998, the Mississippi legislature amended Miss. Code Ann. § 97-3-65 to remove the provision authorizing the death penalty for the rape of a child. However, legislation to reinstate the death penalty for the rape of a child under twelve is presently pending in the Mississippi Legislature, where it passed the Senate on February 27, 2008. *See*, S.B. 2596, 2008 Leg., Reg. Sess. (Miss. 2008), *available at* Mississippi State Legislature, Bill Status http://billstatus.ls.state.ms.us/2008/pdf/history/SB/SB2596.xml (last visited March 3, 2008). The votes are reported as 52 yeas, with no nays, and none absent or not voting. *Id.*

[15] In 1999, the Georgia Legislature re-enacted Ga. Code Ann. § 16-6-1(a)(2), providing for the capital rape of a female less than ten years of age. *See*, http://www.legis.state.ga.us/legis/1999_00/leg//fulltext/hb249.htm Georgia General Assembly, 1999-2000 Session (last visited March 5, 2008).

Under the provisions of Ga. Code Ann. § 17-10-32.1 (West 2007) the defendant could only be sentenced to life imprisonment if the notice was not given. The Georgia Supreme Court rejected the State's contention that it could not file the notice because the death penalty was unconstitutional in a case of rape where the death of the victim does not result. Noting that *Coker* concerned the rape of an adult woman, the Georgia Supreme Court stated, "[n]either the United States Supreme Court, nor this Court, has yet addressed whether the death penalty is unconstitutionally disproportionate for the crime of raping a child." *Velazquez,* 2008 WL 480078 at *2 (Ga. 2008).

Likewise, the Florida Supreme Court in *Buford v. State*, 403 So.2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163 (1982) & 454 U.S. 1164 (1982), found that this Court had not decided whether death is a constitutional punishment for the rape of a child in *Coker*.[16] Although the Florida Supreme Court held that the reasoning of the justices in *Coker* compelled it to reverse a death sentence imposed for the rape of a seven-year-old girl, its opinion does not reflect any attempt to conduct an independent analysis of

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[16] Noting that *Coker* held the death penalty to be unconstitutional under the Eighth Amendment for the rape of an adult woman, the Florida Supreme Court stated: "[t]he Court has yet to decide whether the same holds true for the rape of a child under eleven years of age." *Buford,* 403 So.2d at 950.

whether child rape is more heinous than the rape of an adult for purposes of Eighth Amendment proportionality.[17]

2. Following its decision in *Coker*, this Court considered whether death is a constitutionally excessive penalty when imposed on offenders who neither took life, attempted to take life, or intended to take life, but were convicted of murder under the felony-murder rule and sentenced to death. These cases do not establish a bright-line rule precluding imposition of the death penalty for offenses which do not result in death, but reflect instead the Court's focus upon the culpability of the individual offender.

In *Enmund v. Florida*, 458 U.S. 782 (1982), this Court found the death penalty to be a disproportionate sentence for a robber convicted of murder under Florida's felony-murder rule.[18] This Court stated: "We

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[17] The Florida Supreme Court noted that because the defendant's death sentence was sustained under the conviction of premeditated murder, "the constitutionality of the statute imposing the death penalty for sexual battery becomes academic." *Buford*, 403 So.2d at 951.

[18] This Court noted that in assessing the degree of petitioner's guilt, the Florida Supreme Court stated:

> [T]he only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money.

Enmund, 458 U.S. at 786 (quoting *Enmund v. State*, 399 So.2d 1362, 1370 (Fla. 1981)).

have no doubt that robbery is a serious crime deserving serious punishment. It is not, however, a crime 'so grievous an affront to humanity that the only adequate response may be the penalty of death.' *Enmund*, 458 U.S. at 797 (citing *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (footnote omitted)). Focusing on Enmund's own conduct and culpability, this Court stated that it had an abiding conviction that the death penalty, which is "unique in its severity and irrevocability," is an excessive penalty for the robber who, as such, does not take human life. *Id.*

Thereafter, in *Tison v. Arizona*, 481 U.S. 137 (1987), the petitioners were convicted of capital murder based on Arizona felony-murder law providing that a killing occurring during the perpetration of robbery or kidnapping is capital murder. Continuing its focus upon the mental state of the particular offender, the Court held:

> [T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

Id. at 157-158. Therefore, "major participation in the felony committed, combined with reckless disregard for human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 158.

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Contrary to the petitioner's assertion, this Court's decisions in *Coker*, *Enmund*, and *Tison*, do not draw a "bright-line" between offenses resulting in death and offenses which do not result in death for purposes of the constitutionality of the death penalty. In *Coker*, this Court explicitly stated that the issue before it was the constitutionality of the death penalty for the rape of an adult woman. In *Enmund*, the Court did not simply reverse after determining that Enmund did not kill, attempt to kill, or intend to kill, but instead determined that the death penalty was disproportionate to the underlying offense of robbery under the two part test used in *Coker*.[19]

Importantly, the underlying offenses in *Enmund* (robbery) and *Tison* (robbery and kidnaping), are objectively less heinous than the rape of a child. As this Court noted in *Coker* with respect to the rape of an adult woman, rape is the ultimate violation of self, short of homicide. As this Court's decisions in *Coker* and its progeny have not precluded the death penalty for all non-homicide offenses, it is necessary to address

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[19] In *Tison*, the Court underscored the limitations of the holding in *Enmund* as follows: "This Court, citing the weight of legislative and community opinion, found a broad societal consensus, with which it agreed, that the death penalty was disproportional to the crime of robbery-felony murder 'in these circumstances.'" *Tison*, 481 U.S. at 1682 (citing *Enmund*, 458 U.S. at 788).

the issue of whether the death penalty is a constitutionally permissible punishment for the rape of a child in the context of this Court's Eighth Amendment Jurisprudence.

B. Objective Indicia Reflect a Growing Consensus that the Death Penalty is Not a Grossly Disproportionate Punishment for the Rape of a Child, Reinforcing the Conclusion that Death is a Constitutional Punishment for the Rape of a Child.

First, this Court reviews objective indicia of consensus, as expressed in particular by the enactments of state legislators, before determining, in the exercise of its independent judgment, whether the death penalty is grossly disproportionate for an offense. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

1. In determining whether a punishment is "cruel and unusual" under the evolving standards of decency encompassed by the Eighth Amendment, this Court has begun by examining the enactments of state legislators. In a democracy, the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives. *Furman v. Georgia*, 408 U.S. 238, 436-437 (1972) (Powell, J., dissenting). Moreover, when assessing a punishment selected by a democratically elected legislature against a constitutional measure, this Court presumes its validity:

> We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.
>
> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "(I)n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."

Gregg, 428 U.S. at 175 (quoting *Furman*, 408 U.S. at 383 (Burger, C. J., dissenting)).

The examination of legislative acts involves more than simply a numerical counting of which jurisdictions among the thirty-seven (including the federal government) permitting capital punishment provide for a particular capital prosecution. This Court has also taken into account the direction of any change in that respect. In *Atkins*, this Court noted that with respect to the number of states that had abandoned capital punishment for the mentally retarded following this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Eighth Amendment does not bar execution of the mentally retarded) (overruled by *Atkins*), "it is not so much the number of these States that is significant, but the consistency of the direction

of change." *Atkins v. Virginia*, 356 U.S. 304, 315 (2002).

In *Roper v. Simmons*, 543 U.S. 551 (2005), this Court reinforced the importance of the direction of change to its analysis, finding the fact that five states (four through legislative enactment and one through judicial decision), that had allowed the death penalty for juveniles prior to the decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), now prohibited it, constituted a significant trend toward the abolition of the juvenile death penalty. This Court concluded:

> As in *Atkins*, the objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as 'categorically less culpable than the average criminal.'

Roper, 543 U.S. at 568 (citing *Atkins*, 536 U.S. at 316). In *Roper*, this Court also noted that it had found it to be of particular significance in *Atkins* that "in the wake of *Penry*, no State that had already prohibited the execution of the mentally retarded had passed legislation to reinstate the penalty." *Roper*, 543 U.S. at 566 (citing *Atkins*, 536 U.S. at 315-316).

a. In 1995, Louisiana Revised Statute 14:42(C) was amended by 1995 La. Acts 397, § 1 to allow for

the death penalty when the victim of rape is under the age of twelve.[20] In *State v. Wilson*, 685 So.2d 1063 (La. 1996), the Louisiana Supreme Court noted:

> This amendment began as House Bill 55 which passed in the House of Representatives with a vote of 79 yeas to 22 nays. The Bill was then sent to the Senate which passed it with a vote of 34 years to 1 nay. The Bill was then signed into law by Governor Edwards on 6/17/95 to become effective on 8/15/95.

Id. at 1067, n.5. When the first constitutional challenge to the validity of the capital child rape law was presented to the Louisiana Supreme Court in *State v. Wilson*, Louisiana was at that time the only state with a law in effect providing for the death penalty for the rape of a child. *Id.* at 1068. Florida and Mississippi also had statutes which nominally provided for the death penalty in the case of the rape of a child under twelve, but those statutes were invalidated by the Florida and Mississippi Supreme Courts in 1981 and 1989.[21] Upholding the first constitutional challenge

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[20] La. R.S. 14:42(A) defined aggravated rape as anal or vaginal sexual intercourse committed without the lawful consent of the victim. In 2001, the Louisiana Legislature amended La. R.S. 14:42(A) to define aggravated rape as anal, vaginal or oral sexual intercourse.

[21] *See*, discussion of *Buford v. State*, 403 So.2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163 (1982) & 454 U.S. 1164 (1982), *supra* pp. 28-29; and *Leatherwood v. State*, 548 So.2d 389 (Miss. 1989), *supra* n.14.

to the State's capital rape law in *Wilson*, the Louisiana Supreme Court noted:

> The needs and standards of society change, and these changes are a result of experience and knowledge. If no state could pass a law without other states passing the same or similar law, new laws could never be passed. To make this the controlling factor leads only to absurd results. Some suggest that it has been over a year since Louisiana has amended its law to permit the death penalty for the rape of a child, and that no other state has followed suit. Since its enactment, the statute has been under constant scrutiny. It is quite possible that other states are awaiting the outcome of the challenges to the constitutionality of the subject statute before enacting their own.

State v. Wilson, 685 So.2d 1063, 1069 (La. 1996).

Since this Court denied certiorari in *Bethley v. Louisiana,* 520 U.S. 1259 (1997), Montana's child rape law went into effect,[22] and laws have been enacted in

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[22] Mont. Code Ann. § 45-5-503 (enacted 1997) (sexual intercourse without consent where victim is less than sixteen years of age and offender more than four years older than the victim punishable by death if offender has prior conviction for an offense under the section and inflicted serious bodily injury on a person in the course of committing each offense), *See also*, Mont. Code Ann. § 45-2-101 (2007) ("Sexual intercourse" defined to include anal, vaginal or oral sexual intercourse. Includes penetration of anus or vulva by foreign object or instrument manipulated by another person under certain circumstances.).

an additional four States: Georgia (1999),[23] Oklahoma (2006),[24] South Carolina (2006),[25] and Texas (2007).[26] Additionally, though its death penalty provision was invalidated by judicial decision in 1981, Florida Stat. Ann. § 794.011 continues to provide that the sexual battery of a child under twelve years old by a person at least eighteen years old is punishable by death.[27]

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[23] *See*, Ga. Code Ann. § 16-6-1 (West 2006) (penile-vaginal rape of a female less than ten years of age punishable by death). *See also, supra* discussion at p. 20, *State v. Velazquez*, No. S07G1012, 2008 WL 480078 (Ga. 2/25/08) (Georgia Supreme Court stating that it has never held Ga. Code Ann. § 16-6-1 to be unconstitutional with regard to the death penalty for child rape).

[24] *See*, Okla. Stat. Ann. tit. 10, § 7115(I) (West 2006 Supp.) (forcible anal or oral sodomy, rape, rape by instrumentation, or lewd molestation of a child under fourteen (14) years of age parent or any other person, subsequent to a previous conviction for any such offense, punishable by death).

[25] *See*, S.C. Code Ann. § 16-3-655(C)(1) (2006 Supp.) (sexual battery of victim less than eleven years of age by offender punishable by death if offender previously convicted of offense constituting first degree criminal sexual conduct with a minor less than eleven years old); *See also*, S.C. Code Ann. § 16-3-651 (2007) (defining sexual battery to include anal, oral or vaginal rape).

[26] *See*, Texas Pen. Code § 12.42 (Vernon 2007 Supp.) (anal, oral or vaginal rape of victim under six years old, or anal, oral, or vaginal rape of victim under fourteen years old under circumstances involving bodily injury, threat of bodily injury, use of a weapon, or administration of certain drugs punishable by death where offender has previous conviction for offense punishable under Texas Pen. Code § 12.42).

[27] *See*, discussion of *Buford v. State*, 403 So.2d 943 (Fla. 1981), *supra* p. 14.

While the number of states with capital child rape laws in effect is admittedly less than half of the death penalty jurisdictions, the number of states enacting such legislation in the past few years represents a significant trend toward the capitalization of child rape. The consistency of this trend is illustrated by the fact that in 2008, legislation to authorize the death penalty as punishment for child rape has been filed in Alabama,[28] Mississippi,[29] and Missouri.[30] As this legislation is currently pending, it is possible that at the end of 2008 there will be nine states with such laws. Additionally, although Florida's capital

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[28] *See*, H.B. 456, 2008 Leg., Reg. Sess. (Ala. 2008) (As proposed, would include rape in the first degree, sodomy in the first degree, and sexual torture as capital offenses, where victim is less than twelve, offender is over eighteen and has a previous conviction for such an offense); Alabama Legislature, Prefiled Bills, http://alisondb.legislature.state.al.us/acas/searchableinstruments/2008rs/bills/hb456.htm (last visited March 5, 2008).

[29] *See*, S.B. 2596, 2008 Leg., Reg. Sess. (Miss. 2008) (Currently, bill would amend Miss. Code §§ 97-3-65, 97-3-71, 97-3-95, and 97-3-101 to impose penalty of death or life imprisonment for rape or sexual battery of child younger than twelve where offender has previous conviction for one of these offenses); Mississippi State Legislature, Bill Status, http://billstatus.ls.state.ms.us/2008/pdf/history/SB/SB2596.xml (last visited March 5, 2008).

[30] *See*, S.B. 1194, 94th Gen. Assem., 2d. Reg. Sess. (Mo. 2008) (Bill provides that offenses of forcible rape or sodomy of a child under twelve would be punishable by death or life imprisonment. Prior offense would be one of several statutory aggravating circumstances); Missouri General Assembly, Joint Bill Tracking, http://www.house.mo.gov/billcentral.aspx?pid=26 (last visited, March 5, 2008).

child rape statute was invalidated by the Florida Supreme Court in 1991, the respondent submits that the fact that the Florida Legislature has not repealed or amended the statute to delete the capital provision should weigh on the side of finding that there is no settled societal consensus that death is disproportionate to the offense of capital child rape.[31]

The ongoing legislative activity concerning this issue provides powerful evidence that this Court should not be quick to infer that there is entrenched opposition to capitalizing child rape in states which do not yet have such laws.

b. It is also relevant that 14 states and the federal government authorize the death penalty for non-homicide offenses. This is further indication that *Coker* and its progeny have not been generally understood to preclude the death penalty for all offenses not resulting in the death of a victim. Additionally, with respect to the rape of an adult woman, this Court has stated, "[s]hort of homicide [rape] is the 'ultimate violation of self.'" *Coker*, 433 U.S. at 597. If the rape of a child is a more heinous offense than the rape of an adult woman, then presumably it is also more heinous than any other offense which does not by definition require the actual death of any person.

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[31] It is respondent's position that in *Buford v. State*, 403 So.2d 943 (Fla. 1981) the Florida Supreme Court erroneously concluded that this Court's reasoning in *Coker* compelled it to hold that child rape was not punishable by death under the Eighth Amendment.

As noted previously, six states now provide capital punishment for the rape of a child: Louisiana, Montana, Georgia, Oklahoma, South Carolina, and Texas. Louisiana also authorizes the death penalty for treason, while Georgia authorizes the death penalty for aircraft piracy, aircraft hijacking and aggravated kidnapping. Montana additionally provides the death penalty where the offender is convicted of committed attempted deliberate homicide, aggravated assault, or aggravated kidnapping while in official detention, if the offender has been previously convicted of deliberate homicide or found to be a persistent felony offender.[32]

Additionally, eight states and the federal government also provide the death penalty for non-homicide offenses. Arkansas, California, Illinois, Mississippi, and Washington authorize the death penalty for treason, while New Mexico provides it for espionage.[33] Mississippi also authorizes the death penalty for aircraft hijacking.[34] Colorado and Idaho provide the death penalty for aggravated kidnapping.[35]

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[32] *See*, La. Rev. Stat. Ann. § 14:113 (2007); Ga. Code Ann. §§ 16-11-1; 16-5-44; 16-5-40 (West Supp. 2007); Mont. Code Ann. §§ 46-18-219; 46-18-303 (2007).

[33] *See*, Ark. Code Ann. § 5-51-201 (Michie 1997); Cal. Penal Code § 37 (West 1999); Ill. Comp. Stat. Ann. 38/30-1 (West 2007); Miss. Code Ann. § 97-7-67 (West 2003); Wash. Rev. Code Ann. § 9.82.010 (West 2007); N.M. Stat. Ann. § 20-12-42 (West 2007).

[34] *See*, Miss. Code Ann. § 97-25-55 (West 2003).

[35] *See*, Colo. Rev. Stat. Ann. § 18-3-301 (West 2007); Idaho Code Ann. § 18-4502 (2007).

Although Florida's capital child rape statute has been invalidated by the Florida Supreme Court, Florida provides that importation of 300 kilograms or more of cocaine into the state knowing the probable result of such importation would be the death of any person is a capital offense.[36] At the federal level, excluding treason and espionage, capital punishment is provided for the kingpin of an extremely large continuing criminal drug enterprise.[37]

Significantly, forty percent, or fifteen out of thirty-seven capital jurisdictions provide the death penalty for non-homicide offenses. If pending legislation to capitalize child rape in Alabama, Mississippi, and Missouri is enacted, forty-six percent of capital jurisdictions will so provide.

2. Although the actions of the legislatures are of primary importance as objective indicia of national consensus, this Court has also found the actions of prosecutors and sentencing juries provide a "significant and reliable objective index of contemporary values." *Gregg,* 428 U.S. at 181. However, the fact that petitioner is the first person to be sentenced to death under Louisiana's 1995 law does not establish

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[36] *See,* Fla. Stat. Ann. § 893.135 (West 2007).

[37] *See,* 18 U.S.C. § 3591; 21 U.S.C. § 848.

that jurors or prosecutors believe the death penalty is disproportionate to the offense of child rape.

a. Petitioner's case is one of three tried capitally in Jefferson Parish, Louisiana, and it is the only one of the three in which the jury returned a death sentence. Pet. App. 64a, Jt. App. 139(3), 142(6), 149. On December 17, 2007, a jury in Caddo Parish, Louisiana, determined that Richard Davis should be sentenced to death after finding him guilty of the aggravated rape of a five-year-old girl.[38] Petitioner also contends that he is aware of a fifth aggravated rape case in which prosecutors sought the death penalty at trial.[39] Based upon the available information, it appears that Louisiana capital sentencing jurors have returned a death sentence in two out of five cases in which prosecutors sought it. These numbers do not indicate that Louisiana sentencing juries are unwilling to impose a sentence of death for the rape of a child.[40]

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[38] *State v. Davis*, Case No. 262,971, Caddo Parish, Louisiana.

[39] Pet. Brief at p. 34.

[40] Likewise, the voir dire in this case does not demonstrate that prospective jurors were unwilling to impose the death penalty, or that it was difficult to select a jury. According to the Louisiana Supreme Court's summary of the voir dire process: 24% of prospective jurors were excused due to lack of qualifications, hardship, medical condition, or knowledge of the crime (44 out of 181 prospective jurors); 23% of prospective jurors were excused due to inability to consider a death sentence either generally or with regard to rape (43 out of 181). 43% of the prospective jurors remained to participate in the general voir

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With regard to Louisiana prosecutors' charging and prosecutorial decisions in capital aggravated rape cases, there are no accurate statistics reflecting the total number of death-eligible aggravated rape indictments filed since the effective date of the 1995 amendment. Gathering such statistics would require the examination of every bill of indictment charging the offense of aggravated rape filed in every Parish in the State of Louisiana, from 1995 until the present. Examination of each bill, and sometimes the actual court record, would be necessary to determine the age of the victim of the offense, and to confirm that the date of the offense was not alleged to have occurred prior to the effective date of the amendment.[41] Additionally, it would be necessary to determine which cases involved defendants who were ineligible for the

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dire (78 out of 181). Pet. App. 70a-72a. Out of the 43 prospective jurors excused because they could not consider a death sentence, 17 prospective jurors would not consider a death sentence because the offense was a non-homicide rape, or 9% of the total number of prospective jurors. Pet. App. 71a. Additionally, 16 prospective jurors were excused because they could not consider life (would only consider death) if found petitioner guilty of aggravated rape of child, or 8% of the total number of prospective jurors. *Id.*

[41] The mere fact that a bill of indictment is returned after the effective date of the amendment does not necessarily indicate that the alleged rape occurred after that date as well. Delayed reporting of sexual abuse may result in the arrest and indictment of offenders long after the abuse at issue occurred.

death penalty because they were mentally retarded or juveniles.[42]

Petitioner contends in brief that the various district attorneys of the State of Louisiana have initiated over 180 prosecutions for child rape, since the 1995 amendment to La. R.S. 14:42, citing information provided to the Louisiana Supreme Court in his capital sentencing memorandum. J.A. 12-36. Petitioner contends that to the "best of his knowledge" prosecutors have offered the defendants in each of these cases the opportunity to plead guilty in exchange for a sentence of life imprisonment. Pet. Brief at 34.[43] The information submitted by petitioner

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[42] Although petitioner suggests that he may be mentally retarded, the Louisiana Supreme Court found the pre-trial testimony of Drs. Hannie and Griffin fully supports the determination that he is not. Pet. Brief at p. 7; Pet. App. 102a-107a.

[43] In brief, petitioner appears to suggest that Louisiana's capital rape statute imposes an impermissible burden upon the exercise of petitioner's right to jury trial. Pet. Brief at p. 40 (citing *United States v. Jackson*, 390 U.S. 570 (1968)). There is no merit to this suggestion. In *Jackson*, the death penalty provision of the Federal Kidnapping Act was only authorized where the defendant sought a jury trial. *Id.* at 572. If he entered a plea of guilty or selected a judge trial, the death penalty was not authorized by statute. *Id.* In Louisiana, a defendant may not enter an unqualified plea of guilty in a capital case. La. C.Cr.P. art. 557(A). With the consent of the State and the court, the petitioner may enter a guilty plea with the stipulation that the trial court will sentence him to life imprisonment, or that the trial court will impanel a jury to determine the issue of penalty. *Id.* Moreover, a defendant may not waive trial by jury in a capital case. La. C.Cr.P. art. 780.

does not support a conclusion that prosecutors undertake capital prosecutions merely to obtain pleas to life sentences. It does reflect that in many instances criminal defendants have pled to, or been found guilty of lesser offenses, as they received sentences significantly less than the penalty of life imprisonment without benefit of probation, parole or suspension of sentence mandated by La. R.S. 14:42 on conviction of a non-capital aggravated rape. However, petitioner presents nothing to suggest that the prosecutorial outcomes of particular cases are not the result of the strengths or weaknesses of the individual cases. Additionally, because petitioner provided no disposition for approximately 112 of the 180 cases he provided, it is not evident which of those cases have been resolved, and whether any are presently being prosecuted capitally. *See,* J.A. pp. 12-36.

There is simply no evidence which supports a conclusion that prosecutors in the State of Louisiana consider the death penalty to be an excessive sentence for the rape of a child. Instead, a prosecutor's plea bargaining and charging decisions represent decisions based upon the strengths of particular cases.[44] For example, a prosecutor might determine

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[44] Justice White recognized that prosecutorial decision making is concerned with the strengths and weaknesses of individual cases.

> Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power

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not to pursue a capital verdict for a death-eligible aggravated rape of a particular victim if it allows him to try that offense with non-capital offenses against the same victim, or with non-capital offenses against another victim. A prosecutor may want to join offenses for trial in this manner to present the jury with a stronger, more complete case against a defendant. Additionally concerns regarding the emotional stability, maturity, or communicative abilities of a particular victim may influence charging and plea negotiation decisions. A consideration of the relative strengths and weakness of the case at issue informs every prosecutorial decision.

b. Likewise, there is no reason to conclude that prosecutors and juries in other states believe that the death penalty is disproportionate for the rape of a child. First, it appears that prosecutors in Georgia mistakenly believed that the death penalty provisions of Georgia's capital child rape statute had been invalidated.[45] Petitioner reached a similar conclusion

---

> not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.

Gregg v. Georgia, 428 U.S. 153, 225 (1976) (White, J., concurring).

[45] *State v. Velazquez*, No. S07G1012, 2008 WL 480078, at *2 (Ga. 2/25/08).

as reflected by his contentions in brief that the rape of a child is not a capital crime under *Presnell v. State*, 252 S.E.2d 625, 626 (Ga. 1979) and that the capital rape amendment merely "clarif[ied] an ambiguity in the law's substantive scope." Pet. Brief at 30, n.7 (citing *State v. Lyons*, 568 S.E.2d 533, 535-36 (Ga. App. 2002). On February 25, 2008, the Georgia Supreme Court resolved any ambiguity in this respect when it stated in *State v. Velazquez*, No. S07G1012, 2008 WL 480078 (Ga. 2/25/08), that it had never addressed the constitutionality of the capital child rape law. Moreover experience suggests that the capital child rape statutes of South Carolina (effective July 1, 2006), Oklahoma (effective July 1, 2006), and Texas (effective September 1, 2007) are too recently enacted to have resulted in a capital verdict and sentence.[46]

3. The widespread enactment of "Megan's Laws" has also been posited as an indicator demonstrating "a society more comfortable with the severe punishment and deterrence of child rapists and child molesters."[47] In *Smith v. Doe*, 538 U.S. 84, 89-90 (2002) (Alaska Sex Offender act is a non-punitive,

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[46] Trial in the instant capital case was held over five years after the filing of the bill of indictment due in part to extensive pre-trial litigation and scientific testing of evidence. It should be noted that delayed reporting of offenses committed after the effective date of these statutes may delay the indictment and trial of capital offenses.

[47] Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 Ariz. L. Rev. 198 (2003).

Registration Act that does not violate the *Ex Post Facto* Clause of the Constitution) this Court stated:

> Megan Kanka was a 7-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children. The crime gave impetus to laws for mandatory registration of sex offenders and corresponding community notification.
>
> In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, title 17, 108 Stat. 2038, as amended, 42 U.S.C. §14071, which conditions certain federal law enforcement funding on the States' adoption of sex offender registration laws and sets minimum standards for the state programs. By 1996, every State and the Federal Government had enacted some variation of Megan's Law.

In upholding the Act, the Court found:

> Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." *McKune v. Lile*, 536 U.S. 24, 34, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002); see also *id.*, at 33, 122 S.Ct. 2017

> ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dept. Of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. Of Justice, Bureau of Prisoners Released in 1983, p. 6 (1997))).

Smith, 538 U.S. at 103.

The enactment of "Megan's Laws" reflects a widespread public consensus that convicted sexual offenders represent a substantial threat to society, and demonstrate extreme concern regarding the possible perpetration of sexual offenses against children.

4. These objective indicia of contemporary values reinforce the conclusion that the death penalty is not grossly disproportionate punishment for the rape of a child. This Court has held that public perceptions of standards of decency are not conclusive, and that this Court must bring its independent judgment to bear upon whether punishment comports with the Eighth Amendment. This is because "[a] penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" *Gregg*, 428 U.S. at 173 (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)). However, this Court has cautioned that,

> [W]hile we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Gregg, 428 U.S. at 174-175 (quoting *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring)).

The death penalty serves two principal social purposes: retribution and deterrence of capital crimes by prospective offenders. *Gregg*, 428 U.S. at 183. Retribution "serves an important purpose in promoting the stability of a society governed by law." *Id.* Capital punishment's function in expressing "society's moral outrage at particularly offensive moral conduct . . . is essential in an ordered society that asks its citizens to rely on legal process rather than self-help to vindicate their wrongs." *Id.* The death penalty serves both of these purposes with regard to child rape, as it expresses societies moral outrage at the crime and provides the State with a significant deterrent to child rape.

It is without question that the rape of a child is an offense of the most extreme gravity. In *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography not entitled to First Amendment protection), this Court stated, "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757. Justice Kennedy has recognized that "[w]hen a child molester commits his offense, he is well aware the harm will plague the victim for a lifetime." *Stogner v. California*, 539 U.S. 607, 651 (2003) (Kennedy, J., dissenting) (citation omitted).

Children are profoundly different from adults. During infancy, toddlerhood, preschool, school-age, and early adolescence, they progress through different stages of cognitive and psychosocial development on the way to adulthood and independence.[48] As a result of their immaturity, children are mentally and physically unprepared for sexual activity, yet because of their youth and frailty are unable to protect themselves from rape and other sexual abuse by adults. Moreover, when that abuse occurs during major developmental periods, it "may have a profound and negative effect on the development of [the child's] adult personality."[49] The harm which rape inflicts

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[48] Richard E. Behrman, Nelson Textbook of Pediatrics Ch.7, tbl 7-2 (17th ed., Saunders 2004).

[49] Beth E. Molnar et al., *Child Sexual Abuse and Subsequent Psychopathology: Results From the National Comorbidity Survey*, 91 Am. J. Public Health 753, 757 (2001).

upon a child is therefore one which he or she will suffer throughout life.

Of significance, rape may result in serious physical injury, as it did in the instant case, where the eight-year-old victim required emergency surgery to repair serious tearing of her perineum and vagina.[50] It can also result in infections, and sexually transmitted diseases. One study found data indicating that in females, sexual abuse increases the risk of contracting cervical cancer.[51] Mullen et al., found that there is evidence "that women who report child sexual abuse are at greater risk during adolescence of sexually transmitted diseases, teenage pregnancy, multiple sexual partners, and sexual revictimisation." (citations omitted).[52] A relationship also has been identified between a history of CSA and obesity, which "appears to be particularly strong for those women who

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[50] The victim was an eight-year-old child, and the petitioner was an adult male weighing over three hundred pounds, according to his March 3, 1998 taped statement. Rec. Ex. S-27, S-28.

[51] Karin Bergmark, et al., *Synergy Between Sexual Abuse and Cervical Cancer in Causing Sexual Dysfunctioni*, 31 J. Sex & Med. Therapy 361, 378 (2005).

[52] Paul E. Mullen, et al., *Long Term Effects of Child Sexual Abuse*, Issues in Child Abuse Prevention, Number 9, Autumn 1998, http://www.aifs.gov.au/nch/pubs/issues/issues9/issues9.html. Australia: National Child Protection Clearing House (last visited March 7, 2008).

experienced more severe forms of abuse, such as incidents involving penetration."[53]

> Researchers have also found there is
>
> "an increased risk of psychiatric illness (anxiety disorders, depression, alcohol abuse and/or dependence, drug abuse and/or dependence, eating disorders, conduct disorder, and borderline personality disorder) and other adverse outcomes (suicide attempt, current smoking, sexual revictimization, and relationship problems associated with self-reported CSA".

(footnotes omitted).[54] Moreover, "[t]he greatest risks were associated with CSA involving intercourse." *Id.*[55] The prevalence of psychiatric disorders was higher in persons reporting CSA than the general population. The results for mood, anxiety or substance disorder are particularly striking, in that "78% of the women

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[53] T.B. Gustafson et al., *Childhood sexual abuse and obesity*, 5 Obesity Reviews 129, 133 (2004).

[54] Elliot Nelson et al., *Association Between Self-Reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes: Results from a Twin Study*. 59 Arch. Gen. Psychiatry 139 (2002).

[55] *See also*, Duhe et al., *Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim*. 28 Am. J. Prev. Med. 430, 434 (2005). (Reporting strong evidence that exposure to CSA acts as an increased risk factor for alcohol problems, illicit drug use, suicide attempts, marrying an alcoholic, and marital and family problems, similarly for adult men and women. Moreover, "intercourse CSA was associated with an elevated risk for the outcomes among both genders.")

and 82% of the men reporting CSA met criteria for at least 1 lifetime disorder. This can be compared with finding that 48.5% of women and 51.2% of men in the NCS met criteria for any lifetime disorder."[56]

The severity of child sexual abuse "has also has been associated with subsequent sexual risk behavior."[57] A consequence of sexual abuse may be "traumatic sexualization in which a child develops maladaptive scripts for sexual behavior, when rewarded for sexual behavior by affection."[58] Additionally, if a child learns his or her needs or requests are ignored, the child may feel powerless, and fail to develop the ability to stop unwanted sexual advances later in life. *Id.* Greater feelings of powerlessness may result from more severe abuse involving force or penetration. *Id.*

The fact that the abuse may be perpetrated by a close relative or acquaintance does not mitigate the severity of the long-term consequences. Molnar, et al. found support for the hypothesis that "chronic CSA perpetrated by a close relative or other trusted acquaintance has more severe long-term consequences than isolated incidents perpetrated by strangers."[59]

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[56] *See,* Molnar, et al., *supra* note 49, at p. 757.

[57] Theresa E. Senn, et al., *Characteristics of Sexual Abuse in Childhood and Adolescence Influence Sexual Risk Behavior in Adulthood*, 36 Arch. Sex Behav. 637 (2007).

[58] Senn, et al., *supra* note 57, at p. 643.

[59] Molnar, et al., *supra* at p. 757.

The rape of a child inflicts surpassing harm, including severe long-term effects which are exacerbated by the victim's youth and immaturity at the time of the offense. The death penalty is a reasoned expression of society's moral outrage at this crime, and will serve the purpose of preventing self-help and vigilantism.[60]

In *McKune v. Lile*, 536 U.S. 24, 32 (2002), this Court recognized that "[s]ex offenders are a serious threat in this Nation." Additionally, "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* at 33 (citations omitted). Re-offending declines with age for many groups of offenders, but not for offenders who abuse children.[61] While the death penalty may not deter all

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[60] In 1984, Gary Plauche stepped from a telephone booth in the Baton Rouge airport and shot and killed Jeffrey Doucet, who had been extradited from Los Angeles for allegedly kidnapping and sexually molesting Plauche's young son. Prosecutor Prem Burns stated, "A lot of people have stated that they would have done exactly the same thing as Plauche, if it had been their son." Ed Magnuson, *Up in Arms Over Crime*, Time, Apr. 8, 1985; http://www.time.com/time/magazine/article/0,9171,965498,00.html (last visited March 2008). Plauche pled guilty to manslaughter and received a sentence of five years probation. A.P. *Around the Nation; Informer's Call Reported Before Suspect's Slaying*, The New York Times, March 19, 1984. http://query.nytimes.com/gst/fullpage.html?res=9407E3DC1039F93AA25750C0A962948260&scp=2&sq=Plauche&st=nyt (last visited March 7, 2008).

[61] *See generally*, Brief for the Am. Psychological Ass'n et al. as Amici Curiae Supporting Respondent, *Stogner v. California*, 539 U.S. 607 (2003) (No. 01-1757), 2003 WL 542208 at p. *22-24.

sexual offenders, there will be many for whom it will undoubtedly provide a significant deterrent. Therefore, the State should not be deprived of this significant tool to prevent child rape.

Moreover, the defendant's reliance on *Atkins v. Virginia,* 536 U.S. 304 (2002) is misplaced. In *Atkins,* the Court found that the reduced capacity of mentally retarded offenders provides a second justification for categorically making them ineligible for the death penalty, due to the enhanced risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 320 (citing *Lockett v. Ohio,* 438 U.S. 586, 605 (1978)). The risk was enhanced by the lesser ability of such persons to assist counsel and to make a persuasive showing of mitigating factors. The defendant has neither argued nor alleged that rapists in the aggregate have personal characteristics which cause them to face a special risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

II. Louisiana's Capital Rape Statute Genuinely Narrows the Class of Offenders Eligible for the Death Penalty By Narrowly Defining the Offense.[62]

In order to avoid arbitrary and capricious imposition of the death penalty, the sentencing jury's discretion must be suitably directed and limited. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). The capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant" than on others. *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Lowenfield v. Phelps*, 484 U.S. 231 (1988). This can be accomplished in one of two ways: (1) the legislature may itself narrow the definition of capital offenses, or (2) the legislature may broadly define capital offenses and

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[62] Petitioner contends in brief that the number of defendants subject to prosecution for child rape is extremely large, citing statistics indicating roughly 45,000 reports of sexual abuse a year. Pet. Brief, at p. 45; citing U.S. Dep't of Health & Human Servs., *Child Maltreatment 2004* tbl.3-11 (2006), http://www.acf.hhs.gov/programs/cb/pubs/cm04/table3_11.htm. In 2005, statistics indicate that Louisiana reported 892 child victims of sexual abuse, with child victims including those children up to seventeen years of age, U.S. Dep't of Health & Human Servs., *Child Maltreatment 2005* tbl. 3-3. 3-6 (2007), http://acfhhs.gov/programs/cb/pubs/cm05/table3_6.htm. The report does not differentiate among different types of sexual abuse, which presumably includes victims who were fondled or subjected to a wide variety of non-capital sexual offenses. *Id.* Moreover, there is no reason to believe that the number of perpetrators, who may abuse more than one child, is equal to the number of victims.

provide for narrowing by jury findings of aggravating circumstances at the penalty phase. *Lowenfield*, 484 U.S. at 246. Louisiana has chosen the first method, in that the legislature has narrowly defined the definition of offenses which are punishable by death during the guilt phase. Jt. App. 60a.

On March 2, 1998, the date on which petitioner committed the instant offense, the capital offense of aggravated rape was narrowly defined to include only rapes committed when the anal or vaginal sexual intercourse was deemed to be without consent of the victim because the victim is a child under twelve. La. R.S. 14:42A(4) (West 1997). As *Coker* held only that the death penalty was disproportionate for the rape of an adult female, the statute under which the defendant was convicted is narrowly drawn.

With regard to non-adult, child victims, the statute essentially defined two categories of the offense: 1) aggravated rapes where the anal or vaginal intercourse was deemed to be without consent of the victim because the victim was less than twelve years old;[63] and 2) aggravated rapes of children twelve and older, where the anal or vaginal intercourse was deemed to be without consent of the victim because it was committed under other enumerated circumstances.[64] The definition of either category of aggravated rape excluded acts of oral sexual intercourse.

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[63] La. R.S. 14:42A(4).

[64] La. R.S. 14:42A(1)-(3), (5), & (6).

The first category was punishable by death or life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. The second category was punishable by life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. Therefore, the statute narrowly defined the offense to provide that only offenders who committed oral or anal rapes of children under twelve years of age were eligible for the death penalty. No more is required.[65]

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[65] Although the present version of La. R.S. 14:42 is inapplicable to petitioner's case, it should be noted that the definition of aggravated rape has been amended to include acts of oral sexual intercourse and to increase the maximum age of a victim in the first category of aggravated rape from eleven years of age to twelve years of age (victim under the age of thirteen). *See*, 2003 La. Acts 795, § 1. However, La. C.Cr.P. art. 905.4(10) continues to provide that "[t]he victim was under the age of twelve years." Therefore, the provisions of La. C.Cr.P. art. 905.4 do narrow the class of offenders described in La. R.S. 14:42, as presently written.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the conviction and sentence of the petitioner, Patrick Kennedy.

Respectfully submitted,

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REPLY BRIEF

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PATRICK KENNEDY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari
to the Louisiana Supreme Court

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REPLY BRIEF FOR PETITIONER

The State does not dispute that Louisiana is the *only* jurisdiction in the United States in which Patrick Kennedy could be executed for the crime at issue here – a first conviction for child rape with no aggravating facts beyond the elements of the crime. Nor does the State offer any legitimate reason to condone such punishment, and thereby to re-introduce the prospect of the death penalty into a realm of prosecutions from which it has absent for almost half a century. Petitioner's sentence should be reversed.

I. The Eighth Amendment Bars Imposing the Death Penalty for Child Rape.

The State contends that neither *Coker v. Georgia*, 433 U.S. 584 (1977), and its progeny nor the two-step analysis required by *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), dictates that petitioner's death sentence is unconstitutional. The State is wrong on both counts.

A. In 1977, despite a handful of recently enacted capital rape statutes, this Court found a national consensus against punishing rape with the death penalty and expressed its own "abiding conviction" that "the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life." 433 U.S. at 598 (quotation omitted). This Court reasoned that rape, unlike murder, does not "involve the unjustified taking of a human life." *Id.* Neither the State nor its *amici* respond to these portions of the *Coker* opinion. Instead, they emphasize that this Court described the

sixteen-year-old victim in that case as an "adult woman." Resp. Br. 25-26; Texas Br. 6-7.

This is true enough. But pointing out the age of the victim in *Coker* does not answer petitioner's argument (Petr. Br. 20-21) that the *rationale* of *Coker* applies with equal force to child rape. At the risk of stating the obvious, this Court writes opinions for a reason. Opinions elucidate the principles of law upon which specific holdings are based. They provide stability, predictability, and public respect for the rule of law. When, as here, a litigant offers no justification for why the reasoning of a prior decision is inapplicable, this Court should follow its earlier reasoning.

Following the reasoning of *Coker* here would not, as the State of Texas would have it (Texas Br. 5-6, 10-13), require this Court to adopt any "implicit" view that the death penalty is always impermissible when death does not result. As petitioner *explicitly* stated in his opening brief, *Coker* and its progeny dictate merely that "person-on-person violent crime" cannot justify capital punishment when death does not result. Petr. Br. 26. That principle does not implicate crimes such as treason and terrorism. But that principle does apply here. It also, contrary to the State's suggestion (Resp. Br. 31), is consistent with this Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987). A violent crime in which the victim dies, at least in part due to the defendant's reckless disregard for human life, is worse than one in which the victim continues living. *See Payne v. Tennessee*, 501 U.S. 808, 819 (1991) (discussing *Tison*).

B. Nothing in the State's *Atkins/Roper* analysis provides any reason to question the conclusion that

imposing the death penalty here constitutes cruel and unusual punishment.

1. Despite the State's protestations, all three objective indicia reinforce the national consensus against capital punishment in the context of this case.

a. *Number of states.* Petitioner explained in his opening brief that the key question in surveying states is how many besides the one at hand would allow petitioner to be sentenced to death. Petr. Br. 29-31.[1] If a given state allows the death penalty for the basic crime of which the petitioner was convicted but requires the presence of certain aggravating facts that are not present in petitioner's case, then that state should be counted as opposing the death penalty. *See Enmund v. Florida*, 458 U.S. 782, 789-93 (1982); *Coker*, 433 U.S. at 593-96.

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[1] Contrary to the State's repeated references to the thirty-seven "death penalty jurisdictions," this Court has made it plain that states that bar the death penalty across the board also count for purposes of assessing whether a national consensus exists against the death penalty in a particular context. *See, e.g., Roper*, 543 U.S. at 564 ("30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it, but . . . exclude juveniles from its reach."); *Atkins*, 536 U.S. at 313-15. And contrary to the Missouri Governor's argument (Br. 11-12), "the *absence*" in a state of legislation "affirmatively authorizing the death penalty" for a particular crime signifies that state's stance against it. *See Enmund*, 458 U.S. at 789-93; *Coker*, 433 U.S. at 593-94. This Court inquired in *Roper* and *Atkins* whether certain jurisdictions had laws expressly exempting juvenile and mentally retarded offenders from the death penalty because those jurisdictions had laws on the books otherwise allowing capital punishment for the crimes at issue. Here, that is not the case.

The State does not dispute that this methodology shows that Louisiana is the *only* state in which petitioner could have received a death sentence. In the four states besides Louisiana that recently have enacted laws allowing the death penalty for child rape, the statutes condition death-eligibility on the defendant's having a prior conviction for sexual battery or rape of a child. *See* Petr. Br. 30 & n.7. Notwithstanding the State of Texas's irresponsible suggestion to the contrary (Texas Br. 2), petitioner has no such prior conviction. Before this case, he had never even been *charged* with child rape or any other violent offense.[2] The punishment at issue here, in short, is not only cruel and unusual; it is cruel and unique.

The State also references capital rape statutes in Florida and Georgia (Resp. Br. 37-39), but petitioner could not have received a death sentence in those states either. Florida law does not allow the death penalty for child rape. Although it has a pre-*Coker* statute on the books calling the crime a "capital offense," another statute – which the State ignores – expressly provides that sentencing courts shall sentence offenders to life imprisonment "[i]n the event the death penalty . . . is held to be unconstitutional by the Florida Supreme Court." Fla. Stat. § 775.082(2).

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[2] The State of Texas bases its assertion that petitioner is a "recidivist" on an allegation from one witness during the penalty phase of petitioner's trial – an allegation the jury was never required to evaluate. Even if the allegation had been credible, it would not have satisfied Texas's or any of the other states' recidivism requirements, each of which require the defendant to have a prior *conviction* for child rape. In any event, the Jefferson Parish Sheriff's Office had previously determined that the allegation the witness made against petitioner was *not* credible. Tr. 1439.

The Florida Supreme Court has done just that, *see Buford v. State*, 403 So. 2d 943 (Fla. 1981), and has made it clear that "[t]he crime of sexual battery on a child less than twelve set forth in Florida Statutes section 794.011(2)(a) is referred to as 'capital' sexual battery" in the Florida statutory code only as a "historical[]" matter. *Welsh v. State*, 850 So. 2d 467, 468 n.1 (Fla. 2003). The failure of the Florida Legislature to repeal the superseded penalty is thus meaningless.

Nor does the 1999 Georgia legislation to which the State refers authorize capital punishment for child rape. That enactment merely clarified that when a female rape victim is "less than ten years of age," the victim's youth conclusively establishes the use of force. *See* Ga. Code Ann. § 16-6-1(a)(2); *State v. Lyons*, 568 S.E.2d 533, 535-36 (Ga. App. 2002). To be sure, the Georgia Supreme Court stated after petitioner filed his opening brief that "[p]rior to the 1999 enactment, the death penalty was statutorily authorized under" a different Georgia statute, "[Ga. Code] § 16-6-1(b)." *State v. Velazquez*, ___ S.E.2d ___, 2008 WL 480078, at *2 (Ga. Feb. 25, 2008). But the capital punishment reference in Ga. Code § 16-6-1(b) is part of the state's long-standing general rape law, which applies to victims of all ages and has been treated as a dead letter since *Coker*. Even if operative, that statute does not allow capital punishment unless a jury finds an aggravating circumstance beyond the elements of the offense. *See* Ga. Code Ann. §§ 16-6-1(b), 17-10-30. The jury was not asked to – and did not – find any such aggravating fact in this case.

In any event, even if some or all of the six other states with capital rape statutes on the books could be counted in the State's favor, it still would not matter.

In *Enmund*, eight states authorized capital punishment for the offense at issue, and this Court held that a national consensus existed against such punishment. 458 U.S. at 793. The *Enmund* Court also suggested that even if as many as seventeen states were treated as allowing capital punishment for a given crime, that tally would still "weigh[] on the side of rejecting capital punishment for the crime at issue." *Id.* The numbers in this case do not approach that level under any method of counting.[3]

Finally, the State argues that the prevalence of sex offender registration laws somehow indicates "a society more comfortable with the severe punishment and deterrence of child rapists." Resp. Br. 47 (quotation omitted). Yet the very premise of sex Registration requirements – a premise necessary for their

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[3] The Governor of Missouri (Br. 4) speculates that the current legislative judgment with respect to punishing child rape might be skewed because "*Coker* has distorted any debate on this issue for a generation." Yet the Governor provides not one speck of evidence showing that debate has actually been distorted in Missouri or anywhere else. And in light of "the general popularity of anticrime legislation," *Roper*, 543 U.S. at 566 – including purely symbolic anticrime legislation, *see* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 531-33 (2001); Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 Buff. Crim. L. Rev. 67, 103 (1997) – the suggestion that any legislative body has held back with respect to prescribing harsh punishment for sex offenders seems exceedingly dubious. In any event, this Court in *Coker* itself confronted a situation in which sixteen states had allowed rape to be punished by death prior to this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), but only six had re-enacted such statutes in the uncertain shadow of that decision. This Court did not adjust, much less abandon, its objective analysis based on any speculation regarding *Furman*'s effect on the country's legislative landscape. *See Coker*, 433 U.S. at 593-96.

constitutionality, *see Smith v. Doe*, 538 U.S. 84 (2002) – is that they are *non-punitive* measures designed to regulate the behavior of offenders who are not even incarcerated. Consequently, such laws reveal nothing about public attitudes toward punishing sex offenders. Even if registration laws were lumped in with related efforts to incapacitate convicted sex offenders, that goal is fully achieved by life imprisonment without the possibility of parole – the sentence petitioner will receive if his sentence is reversed.

b. *Actual sentences.* Despite the fact that La. R.S. 14:42 has been in effect for thirteen years, the State does not dispute that petitioner is one of only two defendants actually sentenced to death under the statute. Nor does the State deny that no one has been sentenced to death during the eleven years that Mont. Code § 45-5-503 has been on the books or in the thirty-one years since *Coker* in which Georgia has had a statute on the books arguably allowing the death penalty for child rape. (Even though some confusion has surrounded the post-*Coker* import of Ga. Code Ann. § 16-6-1(b), it is telling that no prosecutor or elected official has ever sought to clarify the situation, much less to enforce that law.) The State contends, however, that actual sentencing decisions belie a national consensus against the death penalty for child rape because "it appears that Louisiana capital sentencing jurors have returned a death sentence in two out of five cases in which prosecutors sought it." Resp. Br. 42.

The State's statistical argument misses the mark. The Eighth Amendment is concerned with punishment that is "unusual" in absolute terms, without regard to how often prosecutors request it from juries. Accord-

ingly, this Court consistently has assessed the numbers of individuals who were actually executed or residing on death row, without regard to how often prosecutors had actually sought such sentences. *See Roper*, 543 U.S. at 564-65 and *id.* at 614 (Scalia, J., dissenting) (surveying number of states who recently had executed juvenile offenders and noting that 123 such offenders were on death row); *Atkins*, 536 U.S. at 316 (conducting same analysis with respect to mentally retarded offenders and citing source indicating that 35 such offenders had been executed since 1976); *Enmund*, 458 U.S. at 794-95 (surveying number of individuals recently executed and on death row "for crimes such as petitioner's"); *Coker*, 433 U.S. at 596-97 (same with respect to death sentences for rape). Here, the simple reality is that a total of *two* people convicted of child rape – out of hundreds of thousands if not millions of such cases across the country over the past few decades – are on death row. *See* Petr. Br. 45 (estimating 45,000 cases of child sexual abuse per year); Texas Br. 23-24 (estimating 80,000 reported cases of child sexual abuse each year plus numerous unreported cases). No one has been executed for any kind of non-homicidal rape in over forty years.

The State notes that prosecutors' "plea bargaining and charging decisions" depend on "'the likelihood that a jury would impose the death penalty if it convicts.'" Resp. Br. 45 & n.44 (quoting *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White, J., concurring)). To the extent that this is true, it reveals a localized consensus against capital punishment for child rape even in Louisiana. In contrast to murder prosecutions, in which the State commonly insists on seeking the death penalty, the State does not dispute

that it has offered defendants the opportunity to plead guilty to life in prison in *every* child rape prosecution it has commenced under La. R.S. 14:42.

The two cases in which Louisiana juries have returned death sentences do not even suggest that cross-sections of Louisiana citizens are willing to impose capital punishment based on distinctly egregious instances of child rape. *See* Petr. Br. 48-49. Rather, the State in those two cases was simply exceptionally successful in "death-qualifying" juries and was prosecuting defendants who not only refused to plead guilty but were disadvantaged in some respect. Here, the State disqualified forty-four potential jurors from the juror pool and ultimately persuaded a predominantly white jury in Jefferson Parish – based on no "positive evidence" of guilt – to sentence a 300-pound black man who is borderline mentally retarded to death. Petr. Br. 13.

c. *Trends.* Faced with an overwhelming national consensus against the death penalty in these circumstances, the State lastly urges this Court to condone petitioner's sentence based on what it calls "a significant trend toward the capitalization of child rape." Resp. Br. 38. Once again, however, the State can make its argument only by means of ignoring this Court's precedent, which renders any such trend irrelevant here. In any event, no real trend exists that supports imposing the death penalty in this case.

This Court's precedent dictates that evidence of a trend can be decisive only when it acts as something of a tiebreaker. In *Atkins* and *Roper*, this Court considered the "direction of the change" in state laws because fully *twenty* states in each case allowed the death

penalty under the circumstances at issue. *Atkins*, 536 U.S. at 313-16; *see also Roper*, 543 U.S. at 564. By contrast, in the last case in which only a handful of states allowed capital punishment for the crime at issue, this Court did not find it necessary to examine any evidence of trends. *See, e.g.*, *Enmund*, 458 U.S. at 789-93 (eight states). When a clear national consensus exists against the death penalty under the circumstances, at issue, that reality controls.

Even if evidence of trends could be relevant here, it would not aid the State. In *Coker*, six states over a period of five years had enacted statutes making at least some form of non-homicidal rape a capital offense. 433 U.S. at 594-95. And over those five years, thirty individuals convicted of rape had been sentenced to death. *See* Brief of Respondent at 21, *Coker v. Georgia*, 433 U.S. 584 (No. 75-5444), 1977 WL 189754. This Court nevertheless held that imposing the death penalty against Coker constituted cruel and unusual punishment.

The evidence of any current trend toward allowing the death penalty for child rape pales in comparison. None of the states that recently have enacted legislation concerning child rape allow the death penalty for nonrecidivists like petitioner. And even if this Court were to look beyond the punishments that other jurisdictions allow for a first conviction for child rape, the calculus would not change materially. Viewed against the backdrop of forty-four years without a single execution for rape of any kind, the enactments of only four states over thirteen years (in the midst of one other state's repealing its law and six other states' rejecting such proposals, *see* Petr. Br. 35 & n.14) hardly signify a shift in societal attitudes. As

this Court observed in *Roper*, "[i]t would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for [the crime at issue] was broadly recognized sooner . . . were to become a reason to [allow the practice]." 543 U.S. at 567 (quotations and citations omitted). Put another way, even if a small handful of states started enforcing capital rape laws, the support for capital punishment in this context would merely approach the level of support that was present in *Enmund* and *Coker*, where in each case this Court still found a decisive consensus against the death penalty.

The recently proposed legislation in various states does not alter this analysis. There is an enormous difference between proposed legislation and enacted legislation. As proof, the Mississippi bill that the State cites has died in committee. S.B. 2596, Regular Sess. (Miss. 2008), *available at* http://billstatus.ls.state.ms.us/2008/pdf/history/SB/SB2596.xml. The Alabama and Tennessee bills are simply reiterations of bills that already died in committees over the past two years. *Compare* H.B. 456, Regular Sess. (Ala. 2008), *with* H.B. 335, Regular Sess. (Ala. 2007); *compare* S.B. 0157, Regular Sess. (Tenn. 2007), *with* H.B. 2924, Regular Sess. (Tenn. 2006). And the proposed bills in Missouri or Colorado have not cleared any of those states' many legislative hurdles.

But to any extent pending legislation across the country is relevant, it signals a populace that is far more skeptical of the death penalty than supportive of it. Legislation to *abolish* the death penalty has been introduced in no fewer than *eighteen* states since 2007, including Montana (where the proposal passed the state senate), Missouri (where a bipartisan group

of fifty-eight lawmakers also is co-sponsoring legislation to impose a moratorium), Mississippi, Texas, and the State of Louisiana itself. Such legislation was recently enacted into law in New Jersey, *see* Death Penalty Information Center, *Facts About the Death Penalty* 1 (2008), and it remains pending in a total of nine states.[4] Accordingly, any conceivable prospect of an additional state or two enacting capital rape legislation is thus dwarfed by the likelihood – at least if measured by proposed bills – that other states will abandon the death penalty entirely.

2. This Court independently has concluded that the death penalty is disproportionate punishment for rape or other person-on-person crimes that do not result in the death of the victim. *See* Petr. Br. 38. The State does not engage this precedent. Instead, it simply says that rape inflicts serious and often lasting harm upon child victims. Resp. Br. 51-55.

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[4] Those nine states are Arizona, Illinois, Kansas, Kentucky, Louisiana, Maryland, Missouri, Nebraska, and New York. *See* H.B. 2297, Regular Sess. (Ariz. 2008); S.B. 328, Regular Sess. (Ill. 2007); H.B. 2510, Regular Sess. (Kan. 2007); H.B. 260, Regular Sess. (Ky. 2008); H.B. 323, Regular Sess. (La. 2008); H.B. 1328, Regular Sess. (Md. 2008); H.B. 2375, Regular Sess. (Mo. 2008); A.B. 542, Regular Sess. (N.Y. 2007). The other states in which legislation recently was introduced are Connecticut, Mississippi, Montana, New Hampshire, New Mexico, South Dakota, Texas, and Virginia. *See* H.B. 5333, Regular Sess. (Conn. 2007); H.B. 216, Regular Sess. (Miss. 2007); Draft B. 87, Regular Sess. (Mont. 2007); H.B. 607, Regular Sess. (N.H. 2007); H.B. 190, Regular Sess. (N.M. 2007); H.B. 1195, Regular Sess. (S.D. 2007); H.B. 745, Regular Sess. (Tex. 2007); H.B. 1960, Regular Sess. (Va. 2007). For a report on the Missouri moratorium legislation, see Bria Scudder, *Moratorium on the Death Penalty Gathers Bipartisan Support*, Columbia Missourian, Apr. 1, 2008.

This discussion does not advance the State's cause. The issue here is not whether child rape inflicts severe harm. Of course it does, and petitioner does not contend otherwise. The issue is whether an individual who commits child rape is *more culpable than the average deliberate murderer*. *See Roper*, 543 U.S. at 571; *Coker*, 433 U.S. at 598. The State does not claim this to be the case. And for good reason: this Court held in *Coker* "in terms of moral depravity and of the injury to the person and to the public, [aggravated rape] does not compare with murder, which does involve the unjustified taking of human life." 433 U.S. at 598.

At any rate, when it comes to assessing social science in the context of capital punishment policy, this Court looks to amicus briefs from "professional organizations" with "germane expertise," *Atkins*, 536 U.S. at 316 n.21 (quotation omitted), not to parties' arguments drawn from generalized journal articles. And here, all of the amici that are expert on the sexual abuse of children support *petitioner*. As the National Association of Social Workers, the National Alliance to End Sexual Violence, and related groups explain in their comprehensive filing, introducing the death penalty into this realm of cases would (1) send a devastating message "to child rape victims that they are akin to murder victims – that is, that they are irreparably harmed and that their lives are effectively over"; (2) "increase the trauma suffered by the victims of child rape" by requiring greater involvement and causing heightened stress in the judicial process; and (3) impede victims' healing process by precluding opportunities for structured confrontations between victims and abusers, who often are family members.

Finally, the risk of wrongful convictions in child rape cases provides additional reason for this Court to eschew the death penalty in this context. The State maintains that such a risk is relevant only if the class of defendants at issue have a "lesser ability . . . to assist counsel and to make a persuasive showing of mitigating factors." Resp. Br. 56. But nothing in this Court's cases is so restrictive. To the contrary, this Court specifically noted in *Atkins* that it "cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." 536 U.S. at 320 n.25. Louisiana is a leading locus of this problem; triple the amount of its death row inmates over the past ten years have been exonerated (eight) as have been executed (three).[5] And the problem of wrongful convictions in capital cases would only accelerate in the specific context of child rape prosecutions, in light of the heightened evidentiary and procedural difficulties present in child abuse prosecutions. *See* Petr. Br. 39-40; Amicus Br. of NACDL & Twelve Innocence Projects.

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[5] Compare Death Penalty Info. Ctr., *Innocence Cases: 1994-2003*, http://www.deathpenaltyinfo.org/article.php?did=2340, *and* Death Penalty Info. Ctr., *Innocence Cases: 2004-Present*, http://www.deathpenaltyinfo.org/article.php?did=2341 (noting exonerations of Curtis Kyles (1998), Shareef Cousin (1999), Michael Graham (2000), Albert Bell (2000), John Thompson (2003), Dan Bright (2004), and Ryan Matthews (2004)), *with* Death Penalty Info. Ctr., *Searchable Database of Executions*, http://www.deathpenaltyinfo.org/executions.php (search "State" for "LA") (noting executions of Dobie Gillis Williams (1999), Feltus Taylor (2000), and Lesile Martin (2002)).

II. Louisiana's Capital Rape Law Does Not Genuinely Narrow the Class of Offenders Eligible for the Death Penalty.

The Eighth Amendment requires a state's capital punishment scheme to "genuinely narrow the class of persons eligible for the death penalty and [to] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of [the same crime]." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The State does not dispute that neither of the aggravating factors that the jury found at the penalty stage of petitioner's trial satisfied this narrowing requirement. Rather, the State contends that Louisiana's aggravated rape statute satisfied the Eighth Amendment's narrowing requirement at the guilt stage, by "defin[ing] the offense to provide that only offenders who committed [vaginal] or anal rapes of children under twelve years of age were eligible for the death penalty." Resp. Br. 59. But nothing in this statutory definition satisfies the narrowing requirement.

The State's reliance on the victim's age fails to respond to petitioner's central argument (Petr. Br. 45-47) that since a victim's youth is the only fact that could conceivably make a perpetrator of rape death-eligible in the first place, that fact that a victim was a child cannot identify the most culpable defendants deserving of the death penalty. What is more, requiring the victim to be less than twelve years old does not do anything at all to guide juries in "distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion) (quotation omitted; alteration in original). There are no doubt hundreds if not thousands of instances of

child rape – defined, as Louisiana does, as any vaginal or anal penetration, regardless of any use of force – across the State of Louisiana every year. Assuming *arguendo* that the Constitution allows the death penalty to be imposed for child rape, Louisiana juries must be given some means of differentiating among the vast sea of such cases.

If the State also means to suggest (Resp. Br. 58) that the 1998 version of its child rape law narrowed the class of death-eligible offenders because it excluded "oral intercourse" from its scope, this suggestion adds nothing. Oral intercourse is not a death-eligible offense. Accordingly, requiring the jury to find that petitioner committed vaginal or anal rape did not oblige it to differentiate petitioner from any other offenders who are supposedly subject to capital punishment by virtue of committing child rape.

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted.

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SUPPLEMENTAL BRIEF

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PATRICK KENNEDY,
Petitioner,

v.

LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

SUPPLEMENTAL BRIEF FOR RESPONDENT IN SUPPORT OF THE PETITION FOR REHEARING

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SUPPLEMENTAL BRIEF FOR THE STATE OF LOUISIANA URGING REHEARING

Pursuant to this Court's order of September 8, 2008, the State of Louisiana submits this supplemental brief.

ARGUMENT

1. In its Petition, Louisiana identified four reasons why this Court should grant rehearing and reargument in light of Section 552(b) of the 2006 National Defense Authorization Act:

(1) The recently enacted Section 552(b), in conjunction with President Bush's Executive Order 13,447, calls into question this Court's finding of "a national consensus against capital punishment for the crime of child rape," Slip op. 23;
(2) The June 2008 opinion effectively voided a federal statute without full briefing and argument by the Solicitor General;
(3) Modifications to the June 2008 opinion are required in light of the actions of both political branches, and the degree and specificity of those modifications will benefit enormously from additional argument, particularly when the initial opinion categorically prohibited the death penalty no matter

what the circumstances of the offense; and

(4) To the extent that individuals might seek to justify the June 2008 decision solely on this Court's "independent judgment" prong, that move itself would require rehearing because it would be a dramatic break with this Court's Eighth Amendment precedents and would benefit from reargument.

Petitioner attempts to minimize Congress's and the President's actions, stating they "might have warranted a footnote in this Court's opinion." Opp. 4. That statement nicely describes his brief's treatment of the matter, but should not guide this Court's opinion. This Court should grant rehearing and reargument, and rule in favor of Louisiana on the merits. This course of action will respect, not pretermit, the continuing development of "evolving standards of decency."

Military law is American law. Yet the briefing to this Court continues to be marred by misstatements that demonstrate an inattention to military law. See *infra* pp. 6, 15 (discussing these misstatements). These harried and inaccurate treatments are not consistent with the respect this Court has traditionally afforded our proud system of military justice, nor are they consistent with the way this Court treats Congressional enactments. "A statute enacted by Congress expresses the will of the people of the United States in the most solemn form." *United States* v. *Lee Yen Tai*, 185 U.S. 213, 222 (1902). As the United States put it, "This Court has never found a 'national consensus' *against* capital

punishment for a particular offense . . . when Congress, consisting of Representatives from all 50 States, has affirmatively authorized such punishment." U.S. Br. 4. Rehearing, and reargument, is necessary to set the record straight.

Louisiana believes that recent trends, in both the federal government and the States, explain why the Eighth Amendment does not prohibit the death penalty for child rapists. Nowhere in his brief does Petitioner acknowledge (let alone answer) the key point that the recency of federal and State action overwhelmingly favors Louisiana. Reh'g Pet. 7-8. "It is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins* v. *Virginia*, 536 U.S. 304, 315 (2002).

That elected legislatures have taken this recent action despite imprecise language in *Coker* v. *Georgia*, 433 U.S. 584 (1977), only underscores the need to revisit the June 2008 opinion. See *Ambler* v. *Whipple*, 90 U.S. 278, 282 (1875) ("[I]f the omissions in the transcript on which the case was heard are material to the decision of the case, it presents a strong appeal for reargument.").

2. Reconsideration respects democratic processes. Without rehearing, there will be no practical way for our polity to demonstrate, now or in the future, that this Court's reading of the Eighth Amendment was incorrect. Legislation will be impossible; opponents can, in good faith, point to this Court's June decision as evidence that proponents are acting unconstitutionally in violation of their Oath. U.S. Const. art. VI. Facing such opposition,

even the hardiest proponents of legislation similar to Louisiana's statute would, and rightly should, fold.

There will, in short, be no way for the "evolving standards of decency" to develop further or to demonstrate that the death penalty for child rape is not "cruel and unusual." While it may be appropriate for this Court to permanently freeze legislation that imposes the death penalty against immutable classes, such as the mentally deficient, that is not the case here.[1] "[W]hat basis is there in any of those sources for concluding that it is the Members of this Court, rather than the elected representatives of the people, who should determine whether the Constitution contains the unwritten rule that the Court announces today?" *Printz* v. *United States*, 521 U.S. 898, 940 (1997) (Stevens, J., dissenting).

The Constitution's commitment to democratic solutions and our federal system favors rehearing. It

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[1] Deferring to the democratic process takes on more, not less, importance in light of Petitioner's claim that no one has been executed for child rape in some decades. Opp. 7. Should this Court grant rehearing, it is highly unlikely that anyone will be executed for child rape during reconsideration. That time could not only provide this Court with briefing and reargument, but also permit a democratic conversation to unfold. "We therefore have a clear question about which institution, a legislature or a court, is relatively more competent to deal with an emerging issue as to which facts currently unknown could be dispositive. . . . [T]he legislative process is to be preferred." *Washington* v. *Glucksberg*, 521 U.S. 702, 788 (1997) (Souter, J., concurring).

The reaction to the June decision illustrates that even a short period of time can shed light on the national consensus, including reactions from the two major Presidential candidates and Members of Congress. See Supp. Br. App. A-E. There is no downside to granting rehearing and much upside.

is up to this Court to "judge whether the Eighth Amendment permits imposition of the death penalty." *Enmund* v. *Florida*, 458 U.S. 782, 797 (1982). However, "[w]hen asked to encroach on the legislative prerogative [the Court is] well counseled to proceed with the utmost reticence." *Furman* v. *Georgia*, 408 U.S. 238, 431 (1972) (Powell, J., dissenting).

The reason for this reticence is simple: "It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency." *Id.* (citing *Trop* v. *Dulles*, 356 U.S. 86, 103 (1958) ("This task requires the exercise of judgment, not the reliance upon personal preferences.")). Yielding to this temptation would make the Court, "under the aegis of the *Cruel and Unusual Punishment Clause*, the ultimate arbiter of the standards of criminal responsibility." *Powell* v. *Texas*, 392 U.S. 514, 533 (1968) (plurality, per Marshall, J.). "The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" *Gregg* v. *Georgia*, 428 U.S. 153, 176 (1976) (citations omitted).

3. The recent federal and State enactments suggest that rehearing and reversal of the June 2008 opinion are appropriate. This Court, heeding *Trop*'s warning of interjecting "personal preferences," is "informed by 'objective factors to the maximum possible extent.'" *Atkins*, 536 U.S. at 312 (citations omitted). See also *Roper* v. *Simmons*, 543 U.S. 551, 564 (2005).

The federal government can punish child rapists only in limited situations, so it is hardly surprising that Congress has not enacted a general law on the matter. However, when Congress *does* act—and in the uniquely federal realm of military law—such action presents compelling objective indicia, particularly when coupled with recent State enactments.

a. This Court has looked to military law in interpreting the Eighth Amendment. For example, *Wilkerson* v. *Utah*, 99 U.S. 130, 134-35 (1879)—discussed at Reh'g Pet. 10 (but not mentioned in Petitioner's opposition)—held: "Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to [including military law] are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category."

In *Furman*—again not mentioned by Petitioner—Justice Brennan emphasized that the Eighth Amendment "establis[hes] a safeguard against arbitrary punishments," and that military law helps determine such safeguards. *Id.* at 274 (Brennan, J., concurring). "This principle has been recognized in our cases. In *Wilkerson*, the Court reviewed various treatises on military law in order to demonstrate that under 'the custom of war' shooting was a common method of inflicting the punishment of death." *Id.* at 275 (citation omitted).

The Court did not refer to military law as an inferior or different class of laws, but rather as illustrative of—in modern terms—objective indicia under a national consensus analysis. U.S. Br. 4-5.

This Court has followed this practice outside of the Eighth Amendment. For example, *Miranda* v. *Arizona*, 384 U.S. 436, 489 (1966), observed that the UCMJ "has long provided that no suspect may be interrogated without first being warned" of his rights. "Conditions of law enforcement in our country *are sufficiently similar to permit reference to this experience* as assurance that lawlessness will not result from warning an individual of his rights." *Id.* (emphasis added).

b. This Court's Eighth Amendment decisions have been in agreement with federal law. *E.g.*, *Atkins*, 536 U.S. at 313; *Roper*, 543 U.S. at 567. Petitioner claims that in three cases, Eighth Amendment challenges have been decided contrary to the UCMJ. Opp. 5. His claims are exaggerated. In *Coker*, because the military death penalty had been thrown into doubt after *Furman*, the UCMJ was not an authoritative guide. 408 U.S. at 412 (Blackmun, J., dissenting) (suggesting that the decision may invalidate UCMJ death-penalty provisions); Gregory English, *The Constitutionality of the Court-Martial Death Sentence*, 21 A.F. L. REV. 552, 552 (1979). See generally *United States* v. *Matthews*, 16 M.J. 354 (C.M.A. 1983); *United States* v. *Curtis*, 32 M.J. 252 (C.M.A. 1991); *Loving* v. *United States*, 517 U.S. 748, 753-754 (1996).

Coker relied on recent evidence from the "immediate, post-*Furman* legislative reaction." *Id.* at 594. It did not look at stale capital statutes, such as the UCMJ, that omitted aggravating factors. Indeed, *Coker* cited a pre-*Furman*, on-the-books federal provision authorizing civilian capital punishment for adult rape, yet described the federal government as

lacking the death penalty for that crime. 433 U.S. at 593 n.6 (plurality) (citing 18 U.S.C. § 2031 (repealed 1986)); *id.* at 595-96 ("Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman.").

Coker's one-State reauthorization stands in marked contrast to this case. Recently, the *federal government* and six other jurisdictions have imposed the death penalty for child rape.

Petitioner's two other cases fare no better. *Enmund* did not cite 10 U.S.C. § 918, but that omission, once again, likely reflects the fact that the military death-penalty process had not yet been revised after *Furman*. Further, § 918 may not have been relevant to the question in *Enmund* (vicarious felony murder) because it only applied to someone who "unlawfully kills a human being." At the time, military courts had not "confronted directly" whether § 918 permitted vicarious felony murder. *United States* v. *Jefferson*, 22 M.J. 315, 321 (C.M.A. 1986). Instead, *Enmund* cited on-point federal law supporting its conclusion. U.S. Br. 5.

Tison v. *Arizona* favors rehearing; the Court found that the "substantial and recent legislative authorization . . . powerfully suggests that our society does not reject the death penalty as grossly excessive under these circumstances." 481 U.S. 137, 154 (1987) (citations omitted). The essential point was not military law, but "substantial and recent legislative authorization." Moreover, *Tison upheld* the death penalty, rendering discussion of military law superfluous. Indeed, *Tison* cited other federal law reflecting the consensus. *Id.* at 154 n.6 (citing 49 U.S.C.App. § 1473(c)(6)(D) (1982)).

Ultimately, in not one of the cases Petitioner cites did this Court cut back on *Wilkerson* or announce that military law was irrelevant to civilian Eighth Amendment challenges.

c. Petitioner contends that "this Court in *Kennedy* asked the right question – namely, whether petitioner is subject to the death penalty under federal law – and gave the right answer: he is not. Nothing more was, or is, required." Opp. 7. Petitioner's reasoning would ultimately plunge this Court's Eighth Amendment jurisprudence into jeopardy.

It is undoubtedly true that Petitioner is not (and will never be) in the military. But Louisiana is *not* arguing that he should be court-martialed. Rather, the point is much simpler and all the more powerful: when Congress enacts a law, be it military or civilian, that law is relevant objective evidence of a national consensus.

Every time the Court decides whether a national consensus exists, it examines the laws of other States not party to the case before it. For example, it would have been no answer in *Roper* to claim that the law of Alabama (which permitted the death penalty for juveniles) and the law of Illinois (which forbade it) were irrelevant because Mr. Simmons faced punishment in Missouri. 543 U.S. at 579-580 (cataloguing Alabama and Illinois law). To accept Petitioner's argument would undo this Court's well-trodden path of resolving Eighth Amendment challenges. Indeed, the failure to consider domestic military law would *a fortiori* call into question any reliance on the laws and practices of foreign jurisdictions.

4. The Court's June 2008 analysis of "objective indicia of consensus" "follow[ed] the approach" of *Roper*, *Atkins*, *Coker*, and *Enmund*. Slip op. 11. Under *Atkins*, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." 536 U.S. at 315.

However, despite the recent statutes and the active consideration of similar measures in at least five other States when *certiorari* was granted, this Court found "no showing of consistent change ha[d] been made." Slip op. 20. At minimum, the recent federal action invites reconsideration.

Reversal may also be appropriate to ensure consistency with *Atkins*, where this Court looked to the entire corpus of legislative action, including *pending measures*.[2] *Atkins* also observed "the evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition." 536 U.S. at 316.

Thus, not only are pending measures potential "evidence" of a national consensus, the relevant votes further bolster that evidence. Federal and State legislators have overwhelmingly supported the death penalty for child rape—1170 to 149.[3]

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[2] *Atkins* cited a vetoed Texas bill as well as "bills [that] have passed at least one house in other States, including Virginia and Nevada." 536 U.S. at 315. See also *id.* at 315 nn.16-17.

[3] The U.S. House vote was 374-41; Louisiana, 113-23; Georgia, 195-2; Montana, 126-23; Oklahoma, 127-16; South Carolina, 83-26; and Texas, 152-18. These statistics understate support since they omit voice votes in the U.S. and South Carolina Senates.

This consistently growing trend is even stronger when considered alongside the overwhelming movement in the Federal Government and States toward greater punishment for abusing and raping children after recent highly publicized crimes. U.S. Br. 7-8.

The societal trend supports not only rehearing, but also a decision to uphold Louisiana's law as a constitutional exercise of its power to prescribe proportionate punishment for an egregious crime. "Congress often can better reflect state concerns for autonomy in the details of sophisticated statutory schemes than can the Judiciary, which cannot easily gather the relevant facts and which must apply more general legal rules and categories." *United States* v. *Morrison*, 529 U.S. 598, 661 (2000) (Breyer, J., dissenting).

5. Petitioner contends that Section 552 was part of a "334-page fiscal appropriations" bill and that the "President's reaffirmation of death as a permissible punishment appears within the 800-plus-page Manual for Courts-Martial." Opp. 9. These claims are flatly wrong and irrelevant to boot.

a. As the Petition explained, the President's decision was made in a specific Executive Order, not the Manual. The Order was devoted almost entirely to overhauling sexual offense punishments. Reh'g Pet. 2-3.

b. Section 552(b) was *not* part of an "appropriations bill"; it was in the 2006 Authorization Act. It was a deliberate response to a DOD report examining the UCMJ's treatment of sex

crimes and particularly the death penalty for child rape. Reh'g Pet. 2; U.S. Br. 3 n.1.

Petitioner asserts that Louisiana was "seriously misleading" about this Report. Opp. 10. While it is true that other State laws were attached alongside Louisiana's (and Louisiana never contended otherwise), he overlooks the portion of the report recommending Interim Maximum Sentences:

> *Coker* effectively invalidated the death penalty authorization in Article 120 in the case of rape involving adult victims in the absence of some particularly aggravating factor. The Supreme Court has not ruled on the constitutionality of the death penalty as it applies to the rape of children. At least one state believes the death penalty is appropriate and constitutional for the rape of a child younger than twelve. In 1995, Louisiana amended its aggravated rape statute...[to allow] the district attorney the discretion to seek the death penalty for cases involving the rape of a child under the age of twelve.

Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice at 74-75, *available at* http://www.dod.mil/dodgc/php/. DOD then highlighted the provision before Congress. Reh'g Pet. 2.

Hence, both Congress and DOD were aware of the questions inherent to applying the death penalty to child rape, and when they had occasion to do so, the political branches restructured the statute to

comply with *Coker*. Just as Louisiana's action influenced federal law, Louisiana's action may well have influenced other jurisdictions had they possessed the time to study these reforms.

c. Petitioner misreads the 2006 Act. He asserts that the Act withdrew legislative support for the death penalty for child rape. Opp. 9 & n.5. Not. At. All.

The Act's interim provisions explicitly *provided* the death penalty for child rape. See § 552(b)(1). The Act put those provisions in place "[u]ntil the President otherwise provides pursuant to section 856 of title 10." *Id.* That is not a withdrawal of the death penalty; it affirmed the child-rape provision and made it consistent with other UCMJ punishments:

> It is clear that Congress has been willing for the President to play the major role in determining what punishments may be imposed by courts-martial. . . . Under Article 56, UCMJ, 10 USC § 856, "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." Article 18, UCMJ, 10 USC § 818, states that a general court-martial "may, *under such limitations as the President may prescribe,* adjudge any punishment not forbidden by [the Code], including the penalty of death when specifically authorized by" the Code. (Emphasis added.) When these Articles are taken together, they reveal that—

> instead of legislating maximum punishments as it has done in Title 18 of the United States Code for cases tried in the District Courts—Congress has decided that the President shall set the maximum punishments imposable in trials by courts-martial.

Curtis, 32 M.J. at 261.

The President has not provided otherwise; he has *confirmed* Congress' imposition of the death penalty for child rape. Petitioner's bizarre claim that the death penalty has been withdrawn ignores the plain text of the Congressional enactment.

d. Finally, the fact that the Parties did not raise § 552(b) beforehand does not make the statute any less deliberate. Opp. 9-11. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). Petitioner's argument would damage the fabric of law—letting courts second-guess which statutes were passed with sufficient attention and which ones were not. Because sufficiency will always be in the eye of the beholder, this is a recipe for disaster.

6. Petitioner also contends that "[t]he military last executed someone for rape in 1961, and it apparently has not even sought—let alone obtained—such a sentence since." Opp. 7-8. This is also wrong. See *United States* v. *Straight*, 42 M.J. 244, 247 (C.A.A.F. 1995) (stating that the Navy sought the death penalty for rape and attempted-

murder).[4] In any event, the recency of the statutes, including Section 552(b), explains these statistics. And due to *Coker*'s broad language, prosecutors may have been unwilling to test the water.[5]

That the death penalty has not been used recently for child rape is no more indicative of a consensus than the fact that no one has been executed for treason since 1859. Reh'g Pet. 7 n.7. In fact, due to the recency of child rape statutes, evidence of a consensus is stronger here than even for treason.

Petitioner also argues that the number of jurisdictions with the death penalty for child rape is small, even counting the federal government. Opp. 11. But the Eighth Amendment test does not employ an abacus; it is a careful inquiry into whether a social consensus exists. This Court has warned that recent and consistent trends far eclipse raw numbers. And here, *the Federal Government*, and jurisdictions encompassing nearly 50 million individuals, recently authorized the death penalty for child rape. Reh'g Pet. 7.

7. Petitioner suggests two ways to sweep the above difficulties under the rug. Both fail.

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[4] Petitioner's brief is marred by a number of other factual errors about the military-justice system. See posting of CAAFlog to CAAFlog, http://caaflog.blogspot.com (Sept. 17, 2008, 21:21 EDT) (discussing some of these errors).

[5] Louisiana understands that this argument is speculative, as is Petitioner's response to it. The only way to find out is to let the democratic process unfold, which favors rehearing for reasons explained in Part 2.

a. He first suggests that this Court can simply leave Section 552(b) for another day. Opp. 7. That solution, deemed insufficient by the very Government administering the statute, is precluded by the categorical opinion below. U.S. Br. 7. Moreover, it would not grapple with the serious questions Section 552(b) raises about this Court's June 2008 opinion. That June decision is susceptible to the same interpretive dilemma as the one *Coker* created. While the military ultimately interpreted that case correctly,[6] other courts and legislators did not. Dissent slip op. at 3-4 (Alito, J., dissenting). Likewise, in this case, legislatures and courts alike may question whether the June opinion is limited to child rape or whether it applies more broadly.

Petitioner contends that this Court has carved out the military in previous cases. Opp. 5-6. But this Court has never held that military personnel could be subject to punishments that it deems "cruel and unusual" for the rest of the population. None of the cases cited by Petitioner at 5-6 suggest otherwise. To do so could create grave equal protection problems. See Laurence Tribe, *The Supreme Court is Wrong on the Death Penalty*, WALL ST. J., July 31, 2008. If a particular child is raped in the suburbs of New Orleans it does not alter the "cruel and unusual" analysis to know that the rapist is in the Coast Guard as opposed to the local police. To give the petty officer death, and the police officer life, is in

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6 "*Coker*, however, leaves open the question of whether it is permissible to impose the death penalty for the rape of a minor by an adult." 2008 Manual for Courts-Martial, Appendix 23, Section 45 (2008).

deep tension with "equal *protection* of the laws." U.S. Const. amend. XIV.

In the rare instances when modern military law employs noncivilian rules, a unique military interest is at stake. For example, in *Parker* v. *Levy*, the issue of disobeying command orders justified special punishment. 417 U.S. 733, 737 (1974). There is no similar argument about child rape, and military courts have drawn no such distinction with adult rape. See *Matthews*, 16 M.J. at 380 (applying *Coker* to courts-martial); *United States* v. *McReynolds*, 9 M.J. 881, 882 (A.F.C.M.R. 1980) (referring to *Coker* as "binding upon us." (citation omitted)); *United States* v. *Clark*, 18 M.J. 775, 776 (N-M.C.M.R. 1984); *Straight*, 42 M.J. at 247.

Petitioner proposes that child rape in the military could be an offense "against the State." Opp. 7. That argument, once again, proves Louisiana's point: The very same observation applies to other, nonmilitary, forms of child rape. The rape of children who are wards of the State or in foster homes could be easily characterized as crimes "against the State." So, too, the rape of a child by a law enforcement officer can have the same impact upon a local community as that hypothesized by Petitioner for the military.[7] However, under the June 2008 decision, these cases, and all others, would be ineligible for the death penalty—no matter how many legislators believe otherwise.

If this Court does not address the relevance of a recent federal law to its objective indicia analysis, it would implicitly subordinate that analysis to this

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[7] Section 552(b) does not limit the death penalty to battlefield situations, as Petitioner's brief implies. Opp. 7.

Court's independent judgment. It would furthermore subject the military justice system to piecemeal application of this Court's holdings and invite uncertainty.

b. In a single paragraph at the end of his brief, Petitioner alternatively suggests that the Court's second prong, its independent judgment, justifies the June 2008 decision. Opp. 11-12. He does not explain how this factor, standing alone, would suffice for a task of such magnitude. This Court has never resorted to its independent judgment alone to void a punishment under the Eighth Amendment: "All of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty." *Stanford* v. *Kentucky*, 492 U.S. 361, 379 (1989) (plurality) (citations omitted).

Moreover, the recent action by Congress and the President evince their independent judgment that the death penalty is appropriate for child rape. Such decisions are relevant not only as indicia of national consensus, but also because they inform this Court's own judgment about what is cruel and unusual. "The usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one . . . ." *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2243 (2008).

Petitioner's suggestion, if anything, boomerangs. His notion that this Court's "independent judgment" alone could void a specific punishment would, on its own terms, require rehearing by jettisoning settled Eighth Amendment jurisprudence. Although this

Court could determine that its independent judgment is controlling, at present that factor is but one aspect of a complex Eighth Amendment analysis. As the Petition explained, such a dramatic departure from precedent would need to be tested and shaped appropriately through reargument. Reh'g Pet. 4-5, 12-13. Petitioner's Opposition never contends otherwise.

CONCLUSION

Accordingly, the Petition should be granted.

Respectfully submitted,

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September 24, 2008

APPENDIX

APPENDIX A

Statement of Senator John McCain

TITLE: Statement of Senator John McCain: McCain Disappointed with Supreme Court Ruling that Fails to Protect our Children.

DATE: June 25, 2008

SOURCE: Office of Senator John McCain, Press Release

WASHINGTON, D.C. – U.S. Senator John McCain (R-Ariz.) today released the following statement regarding the Supreme Court's decision issued in *Kennedy v. Louisiana*:

"As a father, I believe there is no more sacred responsibility in American society than that of protecting the innocence of our children. I have spent over twenty-five years in Congress fighting for stronger criminal sentences for those who exploit and harm our children. Today's Supreme Court ruling is an assault on law enforcement's efforts to punish these heinous felons for the most despicable crime. That there is a judge anywhere in America who does not believe that the rape of a child represents the most heinous of crimes, which is deserving of the most serious of punishments, is profoundly disturbing."

APPENDIX B

Statement of Senator Barack Obama

TITLE: Obama Disagrees with High Court on Child Rape Case

DATE: June 25, 2008

AUTHOR: Sara Kugler

SOURCE: Associated Press

Democrat Barack Obama said Wednesday he disagrees with the Supreme Court's decision outlawing executions of people who rape children, a crime he said states have the right to consider for capital punishment.

"I have said repeatedly that I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes," Obama said at a news conference. "I think that the rape of a small child, 6 or 8 years old, is a heinous crime and if a state makes a decision that under narrow, limited, well-defined circumstances the death penalty is at least potentially applicable, that that does not violate our Constitution."

The court's 5-4 decision Wednesday struck down a Louisiana law that allows capital punishment for people convicted of raping children under 12, saying it violates the Constitution's ban on cruel and unusual punishment.

The ruling spares the only people in the U.S. under sentence of death for that crime — two Louisiana men convicted of raping girls 5 and 8. It also invalidates laws on the books in five other states that allowed executions for child rape that does not result in the death of the victim.

Obama's Republican rival, John McCain, also criticized the court's decision, calling it "an assault on law enforcement's efforts to punish these heinous felons for the most despicable crime."

"That there is a judge anywhere in America who does not believe that the rape of a child represents the most heinous of crimes, which is deserving of the most serious of punishments, is profoundly disturbing," McCain said in a statement.

Obama, the likely Democratic presidential nominee, said that had the court "said we want to constrain the abilities of states to do this to make sure that it's done in a careful and appropriate way, that would have been one thing. But it basically had a blanket prohibition and I disagree with that decision."

Obama has two daughters, ages 7 and 9.

He has long supported the death penalty while criticizing the way it is sometimes applied.

As an Illinois legislator, he helped rewrite the state's death penalty system to guard against innocent people being sentenced to die. The new safeguards included requiring police to videotape interrogations

and giving the state Supreme Court more power to overturn unjust decisions.

He also opposed legislation making it easier to impose the death penalty for murders committed as part of gang activity. Obama argued the language was too vague and could be abused by authorities.

But Obama has never rejected the death penalty entirely. He supported death sentences for killing volunteers in community policing programs and for particularly cruel murders of elderly people.

"While the evidence tells me that the death penalty does little to deter crime, I believe there are some crimes — mass murder, the rape and murder of a child — so heinous, so beyond the pale, that the community is justified in expressing the full measure of its outrage by meting out the ultimate punishment," he wrote in his book "The Audacity of Hope."

In 1988, a question about rape and capital punishment tripped up Democratic presidential nominee Michael Dukakis.

Dukakis was asked during a nationally televised debate with Republican George H. W. Bush whether he'd still oppose the death penalty if his wife were raped and murdered.

His unemotional, dispassionate answer was ridiculed, and gave Republicans more material to paint him as an emotionless liberal.

At the news conference Wednesday, Obama answered questions on a number of topics, including a compromise eavesdropping bill the Senate was preparing to consider. He said he supports the bill, which would establish new rules to govern when the National Security Agency, CIA, FBI or others can tap American phone and computer lines.

The bill also effectively gives legal immunity to telecommunications companies that helped the government eavesdrop on calls and e-mails for years after the Sept. 11 terrorist attacks, without the approval of a special, secret court.

Obama, who opposed an earlier version of the bill, said he supports the compromise partly because it would prohibit presidents from superseding surveillance rules in the future.

APPENDIX C

Letter from Representative Roy Blunt, *et al.*

July 10, 2008

Chief Justice John G. Roberts, Jr.
Justice John Paul Stevens
Justice Antonin Scalia
Justice Anthony M. Kennedy
Justice David H. Souter
Justice Clarence Thomas
Justice Ruth Bader Ginsburg
Justice Stephen G. Breyer
Justice Samuel A. Alito, Jr.
Supreme Court of the United States
Washington, DC 20543

Dear Justices,

We were deeply dismayed by the Court's decision in *Kennedy v. Louisiana* on June 25, 2008, that failed to understand both the immeasurable pain, anguish and life-long scars of children under twelve who are brutally raped by an adult and the legislative response that balanced that harm by making the death penalty the maximum punishment for these horrific crimes. However, we were even more troubled to learn that a central factual basis for the majority opinion was not only incomplete, but inaccurate.

Specifically, the Court in the majority opinion noted that in the Federal Death Penalty Act of 1994 Congress "expanded the number of federal crimes for

which the death penalty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse." The Court went on to state that "[t]he evidence of a national consensus with respect to the death penalty for child rapists... shows divided opinion but, on balance, an opinion against it." Further, the Court noted that "[t]hirty-seven jurisdictions—36 States plus the Federal Government—have the death penalty" but "only six of those jurisdictions authorize the death penalty for rape of a child."

Apparently, the Court was unaware of the "national consensus" on this issue enacted just two years ago. In particular, Congress in 2005 through the duly elected representatives from all across the country enacted the death penalty for child rapists under the Uniform Code of Military Justice. That provision—Section 552(b) of the National Defense Authorization Act for Fiscal Year 2006 (became Public Law No. 109-163 on January 6, 2006)—provides that until the President otherwise provides the punishment for the rape of a child may not exceed "death or such other punishment as a court-martial may direct." In September 2007, President Bush issued Executive Order 13447 that codified the provisions of Public Law 109-163, including the provision of the death penalty for child rape, into the 2008 edition of the Manual for Courts-Martial. Accordingly, the Federal Government does indeed have the death penalty for the rape of a child.

More importantly, the adoption of that provision clearly demonstrated a "national consensus" of which the Justices were not aware. The

provision was included in a bill that passed the House by a vote of 374-41, and the Senate by a vote of 95-0. In the House, the 374 Members supporting the bill represented all 50 states, while the 41 Members voting against the bill were from just 16 states and together none of those opposing the bill represented a majority of that state's Congressional delegation. In the Senate, both Senators from 45 States voted in favor of the bill. In addition, one senator from the other five states supported the bill and no Senator voted in opposition; putting all 50 states in support of this provision.

As such, we the undersigned Members of Congress respectfully ask the Court to sua sponte withdraw its June 25, 2008 opinion in this matter and reconsider the case in light of the full and complete factual picture.

Sincere Regards,

1. Aderholt, Robert B., AL (4th)
2. Akin, W. Todd, MO (2nd)
3. Alexander, Rodney, LA (5th)
4. Bachmann, Michele, MN (6th)
5. Barrett, J. Gresham, SC (3rd)
6. Bilirakis, Gus M., FL (9th)
7. Blackburn, Marsha, TN (7th)
8. Blunt, Roy, MO (7th)
9. Boehner, John A., OH (8th)
10. Boozman, John, AR (3rd)
11. Boustany, Charles, LA (7th)
12. Brady, Kevin, TX (8th)
13. Broun, Paul C., GA (10th)
14. Brown-Waite, Ginny, FL (5th)

15. Buyer, Steve, IN (4th)
16. Camp, Dave, MI (4th)
17. Cantor, Eric, VA (7th)
18. Carter, John R., TX (31st)
19. Chabot, Steve, OH (1st)
20. Cole, Tom, OK (4th)
21. Conaway, Michael, TX (11th)
22. Crenshaw, Ander, FL (4th)
23. Cubin, Barbara, WY (At Large)
24. Culberson, John, TX (7th)
25. Davis, David, TN (1st)
26. Davis, Geoff, KY (4th)
27. Dent, Charles W., PA (15th)
28. Duncan, John J., Jr., TN (2nd)
29. Feeney, Tom, FL (24th)
30. Forbes, J. Randy, VA (4th)
31. Foxx, Virginia, NC (5th)
32. Gohmert, Louie, TX (1st)
33. Goodlatte, Bob, VA (6th)
34. Granger, Kay, TX (12th)
35. Graves, Sam, MO (6th)
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38. Heller, Dean, NV (2nd)
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40. Hunter, Duncan, CA (52nd)
41. Johnson, Sam, TX (3rd)
42. Jones, Walter B., NC (3rd)
43. Jordan, Jim, OH (4th)
44. Kingston, Jack, GA (1st)
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46. Kline, John, MN (2nd)
47. Kuhl, Randy, NY (29th)
48. Latta, Bob, OH (5th)
49. Lamborn, Doug, CO (5th)

50. LoBiondo, Frank, NJ (2nd)
51. Lungren, Daniel E., CA (3rd)
52. McCarthy, Kevin, CA (22nd)
53. McHenry, Patrick, NC (10th)
54. McKeon, Buck, CA (25th)
55. McMorris Rodgers, Cathy, WA (5th)
56. Manzullo, Donald, IL (16th)
57. Miller, Candice S., MI (10th)
58. Miller, Gary G., CA (42nd)
59. Miller, Jeff, FL (1st)
60. Myrick, Sue, NC (9th)
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APPENDIX D

Laurence Tribe, Wall Street Journal

TITILE: The Supreme Court is Wrong on the Death Penalty

AUTHOR: Laurence H. Tribe

DATE: July 31, 2008

SOURCE: Wall Street Journal

It's not often that the U.S. Supreme Court is asked by a state and the federal government to reconsider a case it has just handed down because it missed key evidence.

But that is what is happening now in *Kennedy v. Louisiana*. In that case, the court ruled in late June that Louisiana could not execute someone convicted of violently raping a child. Dividing along familiar 5-4 lines, the court held, speaking through Justice Anthony Kennedy, that the death penalty must be reserved for killers and traitors. To apply it to others, including the most reprehensible violators of young children, would constitute a "cruel and unusual punishment" violating the Constitution's Eighth Amendment.

Emphasizing the evolving character of what constitutes an "unusual" if not an unduly "cruel" punishment, the court rested its condemnation of executing the rapists of children largely on what it

described as a trend away from the use of death to punish such crimes both here and abroad.

But there was a problem with the court's understanding of the basic facts. It failed to take into account—because nobody involved in the case had noticed—that in 2006 no less an authority than Congress, in the National Defense Authorization Act, had prescribed capital punishment as a penalty available for the rape of a child by someone in the military.

Defenders of the court's decision in *Kennedy v. Louisiana* would have it ignore that embarrassing wrinkle by treating the military as a parallel universe that simply does not intersect civilian justice on the plane of constitutional principle. But a court searching for universal principles of justice in the name of the Eighth Amendment would be hard pressed to accept that view of the military/civilian distinction. Particularly when the court's division tracks the usual liberal/conservative divide, its credibility depends on both candor and correctness when it comes to the factual predicates of its rulings.

Whatever one's view of the death penalty—and I have long expressed misgivings on both its wisdom and its constitutionality—it's important that the inequities and inequalities in its administration be minimized. Commitment to that principle, not a rush to the center, lay behind Barack Obama's disagreement with the court's ruling in this case even before the 2006 federal death penalty provision came to public attention.

Many who applauded the court's original ruling did so not on the basis of the court's (now evidently faulty) trend-spotting rationale but, rather, on the premise that any way of containing the spread of capital punishment—such as by confining its use to murderers and traitors—is a good idea. But even those who harbor serious doubts about capital punishment should feel duty-bound to oppose carve-outs from its reach that denigrate certain classes of victims, or that arbitrarily override democratic determinations that such victims deserve maximum protection.

If a legislature were to exempt the killers of gay men or lesbians from capital punishment, even dedicated death penalty opponents should cry foul in the Constitution's name. So too, should they cry foul when the judiciary holds the torturers or violent rapists of young children to be constitutionally exempt from the death penalty imposed by a legislature judicially permitted to apply that penalty to cop killers and murderers for hire. In doing so, the court is imposing a dubious limit on the ability of a representative government to enforce its own, entirely plausible, sense of which crimes deserve the most severe punishment.

To be sure, holding the line at murder and treason gives the judiciary a bright line that blurs once one says a legislature may include other offenses in its catalogue of what it deems the most heinous of all crimes. But the same may be said of virtually any bright line. Placing ease of judicial administration above respect for democracy and for principles of equal justice under law is inexcusable.

The Eighth Amendment's cruel and unusual punishment clause should not be construed in a manner that puts it on a collision course with the 14th Amendment's equal protection clause. The Supreme Court would do well to take that overriding consideration into account as it decides whether to revisit its seriously misinformed as well as morally misguided ruling.

APPENDIX E

Washington Post Op-Ed

TITLE: Supreme Slip-Up; A recent high court ruling is factually flawed. The justices should correct it.

DATE: Saturday, July 5, 2008; A14

SOURCE: Washington Post

When a newspaper gets its facts wrong, it's supposed to publish a correction, and, if someone's reputation has been harmed, a retraction and apology. It can be embarrassing, but the occasional taste of crow probably does more good than harm to the media's credibility.

But what if the Supreme Court not only blows a key fact but also bases its ruling, in part, on that error? There was quite a goof in the court's 5 to 4 decision on June 25 banning the death penalty for those who rape children. The majority determined that capital punishment for child rape was unconstitutional, in part because a national consensus had formed against it. As evidence, the court noted that "37 jurisdictions—36 States plus the Federal Government—have the death penalty. [But] only six of those jurisdictions authorize the death penalty for rape of a child." Actually, only two years ago, Congress enacted a death penalty for soldiers who commit child rape, as part of an update to the Uniform Code of Military Justice (UCMJ). Irony of ironies: The court has cast doubt on the

constitutionality of an act of Congress based on the erroneous claim that the statute did not exist.

This is not the court majority's fault alone. In his dissent, Justice Samuel A. Alito, Jr. did not spot the error. Neither party in the case—the state of Louisiana and convicted rapist Patrick Kennedy—raised it. Nor was it mentioned in 10 friend-of-the-court briefs on both sides. The Justice Department, which normally weighs in on cases affecting federal statutes, has admitted that it should have noted the 2006 law. (Blame the media, too; only after a legal blogger, Col. Dwight H. Sullivan, had pointed out the mistake did a newspaper, the New York Times, take note.) The UCMJ change was quietly tucked into a huge defense authorization bill. Still, it passed both houses and President Bush signed it, so it enjoyed the same presumptions of validity and constitutionality as any other law.

The Supreme Court's legitimacy depends not only on the substance of its rulings but also on the quality of its deliberations. That's why we think the court needs to reopen this case—even though we supported its decision. The losing party, Louisiana, still has time to seek a rehearing, which the court could grant with the approval of five justices, including at least one from the majority. The court could limit reargument to briefs on the significance of the UCMJ provision. We doubt the case will come out much differently; we certainly hope not. But this is an opportunity for the court to show a little judicial humility. Before the court declares its final view on national opinion about the death penalty, it should accurately assess the view of the national legislature.

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

—v.—

LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF LOUISIANA, AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU of Louisiana is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving serious questions regarding the constitutionality of the use of the death penalty as a punishment for child rape. Given its longstanding interest in the protections contained in the Constitution, including the Eighth Amendment's prohibition against cruel and unusual punishment, the proper resolution of those questions is a matter of substantial importance to the ACLU and its members.

The NAACP Legal Defense and Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African-Americans in securing their rights by the prosecution of lawsuits. Its purposes include rendering legal aid without cost to African-Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have represented parties and it has participated as

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[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

amicus curiae in this Court, in the lower federal courts, and in state courts.

The LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on the death penalty in particular. Accordingly, LDF represented the defendants in, *inter alia*, *Furman v. Georgia*, 408 U.S. 238 (1972), *Coker v. Georgia*, 433 U.S. 584 (1977), *McClesky v. Kemp*, 481 U.S. 279 (1987), *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973), and appeared as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Miller-El v. Dretke*, 545 U.S. 231 (2005), *Johnson v. California*, 545 U.S. 162 (2005), and *Roper v. Simmons*, 543 U.S. 551 (2005).

SUMMARY OF ARGUMENT

In this brief, *amici* explore the historical record of the use of the death penalty for rape. This record establishes a longstanding societal consensus that the death penalty is a disproportionate penalty for the rape of victims of all ages. The sole exception has been the historical willingness of southern states to execute blacks for rape, especially those convicted of raping white women and children.

Historically, the use of the death penalty for rape, far more than any other crime, has been driven by obvious racial discrimination. Apparently, no white man has ever been executed in the U.S. for the non-homicide rape of a black woman or child. Capital punishment for rape has its roots in the antebellum South, where even the attempted rape of a white

female by a slave mandated a death sentence, but where a slave woman could not be raped by her master, and where her rape by another white man was merely a trespass against her master. The end of the Civil War saw an extraordinary rise in the frequency of lynching, and the most common justification was that white women needed protection from black rapists and attempted rapists.

The scourge of racial bias continued unabated through much of the 20th century, when black men convicted of rape in the South received death sentences in grossly disproportionate numbers, especially when they were convicted of raping a white woman or child. Between 1930 and 1972, 455 people were executed for rape in the United States; 405, or 89.1 percent, were black, and 443 were executed in former Confederate states. During this period, Louisiana, Mississippi, Oklahoma, Virginia, West Virginia, and the District of Columbia did not execute a single white man for rape, but together these jurisdictions executed 66 blacks. Arkansas, Delaware, Florida, Kentucky, and Missouri each executed one white man for rape during this period, but together they executed 71 blacks.

This blot on the historical record, particularly in light of the stark racial biases and tensions that continue to affect Louisiana and other parts of the nation, is yet another compelling reason for this Court to refuse to countenance the use of the death penalty for rapists, including child rapists.

ARGUMENT

APART FROM THE HISTORICAL WILLINGNESS OF SOUTHERN STATES TO EXECUTE BLACKS FOR RAPING WHITE WOMEN AND CHILDREN, AMERICAN SOCIETY HAS LONG VIEWED DEATH AS A DISPROPORTIONATE PENALTY FOR THE RAPE OF A VICTIM OF ANY AGE.

Under the Eighth Amendment, death is an excessive penalty for a crime when its imposition is contrary to "'civilized'" or "'evolving'" "'standards of decency.'" *Roper v. Simmons*, 543 U.S. at 561 (2005) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion)); *Penry v. Lynaugh*, 492 U.S. 302, 331, 335 (1989) (citing *Coker v. Georgia*, 433 U.S. at 593-97, and *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). This Court has consistently held that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry*, 492 U.S. at 331. This Court has also made it clear that, in addition to legislative enactments, courts should look to the "[]frequency of [the death penalty's] use even where it remains on the books," and the direction of any change on the issue. *Roper*, 543 U.S. at 567; *Atkins v. Virginia*, 536 U.S. 304, 313-16 (2002). Finally, this Court has held that it must exercise its "own judgment" whether the death penalty is a disproportionate punishment for juveniles. *Coker*, 433 U.S. at 597; *Roper*, 543 U.S. at 563.

In his brief, petitioner Patrick Kennedy persuasively demonstrates that contemporary data

regarding both the number of states that authorize the death penalty for child rape and the infrequency of its imposition reveal an overwhelming national consensus that the death penalty is a disproportionate punishment for this crime. Here, *amici* examine the historical record of the use of the death penalty for rape, which shows a longstanding societal consensus that the death penalty is a disproportionate penalty for the rape of victims of all ages—except when a black defendant raped a white woman or child in the South.

A. Historically, prosecutors and jurors have been unwilling to authorize the death penalty for rape, including child rape.

The historical record demonstrates that prosecutors and juries have been singularly unwilling to impose death on rapists, including child rapists.

In its 1977 decision in *Coker*, this Court reviewed the available evidence concerning the willingness of prosecutors to seek and juries to return death sentences in rape cases. 433 U.S. at 596-97. This Court found that "in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence," and concluded that this factor weighed heavily in favor of finding capital punishment a disproportionate penalty for rape. *Id.* Other analyses have confirmed this finding. *See, e.g.*, James W. Marquart, et al., THE ROPE, THE CHAIR, AND THE NEEDLE 64 (1994) ("Between 1923 and 1971, prison records reveal, 2,308 persons were convicted of rape in the state of Texas. Among those offenders, only 5 percent (118) received the death penalty; the rest served a prison sentence."); Marvin

E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 Annals of the Am. Acad. of Pol. and Soc. Sci. 119, 129 (1973) (among the 1,265 persons convicted of rape in Alabama, Arkansas, Florida, Georgia, Louisiana, South Carolina, and Tennessee between 1945 and 1965, less than 9.5 percent received a death sentence).

Evidence from Mississippi after 1972 also suggests that jurors and prosecutors view death as a disproportionate penalty for child rape. At the time *Coker* was decided, Mississippi had a statute authorizing capital punishment for the rape of a child.[2] *See Coker*, 433 U.S. at 595 (citing Miss. Code Ann. § 97-3-65 (Supp. 1976)). In 1989, the Mississippi Supreme Court ruled that a defendant convicted under this statute could be sentenced to death only if, in addition to committing rape, he or she killed, attempted to kill, intended to kill, or contemplated using lethal force. *Leatherwood v. State*, 548 So.2d 389, 402-03 (Miss. 1989). In the intervening thirteen years when child rape by itself was punishable by death, Mississippi juries returned only two death sentences. *See id.*; *Upshaw v. State*, 350 So.2d 1358 (Miss. 1977).

In short, both the contemporary and the historical evidence demonstrate that prosecutors and juries have been, and remain, singularly unwilling to authorize the execution of rapists, including child rapists.

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[2] Mississippi was one of only two states that authorized the death penalty for child rape. The other was Florida, and four years after *Coker* the Florida Supreme Court declared its state law unconstitutional. *Buford v. State*, 403 So.2d 943 (Fla. 1981).

B. Historically, the death penalty for rape was reserved for blacks in the South, especially those convicted of raping white women and children.

There is, however, one profoundly unsettling exception to this otherwise nearly universal refusal by prosecutors and juries to authorize death as a punishment for rape: the historical willingness of prosecutors and juries in the South to impose the death penalty on black men convicted of rape, especially those convicted of raping white women and children.

Historically, the use of death as a penalty for rape, far more than any other crime, has been driven by obvious racial discrimination. Apparently, no white man has ever been executed in the U.S. for the non-homicide rape of a black woman or child. *See* Michael L. Radelet, *Executions of White for Crimes Against Blacks: Exceptions to the Rule?*, 30 Soc. Q. 529, 537-41 (1989) (describing all white-on-black cases that have resulted in an execution); *see also* Wolfgang & Riedel, *supra*, at 125 (reporting on a study by the Florida ACLU of sentences imposed in Florida for rape between 1940 and 1964, which found that "none of the eight white offenders who raped black females received the death penalty").

As petitioner noted in his petition for a writ of certiorari, "executing people for rape has its roots in the Southern antebellum practice of hanging slaves believed to have committed this crime." Petition for a Writ of Certiorari at 21, *Kennedy v. Louisiana*, No. 07-343 (U.S. Sept. 2007) (citing Stuart Banner, THE DEATH PENALTY: AN AMERICAN HISTORY 139-42 (2002)). The "rape of a white woman ... [was a]

capital crime[] in all slaveholding states." John Hope Franklin & Alfred A. Moss., Jr., FROM SLAVERY TO FREEDOM 115 (1988). However, "[n]o white rapists are known to have been hanged in the antebellum South." Banner, *supra*, at 139; *see also* William J. Bowers, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA 1864-1982 139-40 (1984); Banner, *supra*, at 140-43 (under the statutes of two states capital punishment was reserved solely for black rapists).

In much of the antebellum South, even "[a]ttempted rape of a white woman was a capital crime for blacks," although not for whites. Banner, *supra*, at 140-41. Louisiana's legal provisions mandated capital punishment for both the rape and the attempted rape of a white female by a slave. *See* La. Sess. Acts 1857 p. 230 (death penalty mandatory for rape or attempted rape of any white female by a slave); Bill Quigley & Maha Zaki, *The Significance of Race: Legislative Racial Discrimination in Louisiana, 1803-1865*, 24 S.U. L. Rev. 145, 147-53 (1997) (detailing Louisiana's Black Code of 1806, which made the "rape or attempted rape of any white woman or girl" by a slave punishable by death); *see also* Bowers, *supra*, at 139-40 (describing nineteenth-century "rape statutes that specified punishment according to the race of both offender and victim," and which "underscored restrictions on the kinds of interracial contact that could be tolerated"); Ga. Penal Code of 1816, §§ 33-34.[3]

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[3] In 1816, the Georgia penal code expressly provided that rape committed by a white man would be punished by a term of imprisonment of not more than twenty years, and attempted rape by not more than five years, but that slaves and "free persons of color" were to be put to death for the crimes of rape or attempted rape of a free white female. Ga. Penal Code of

A slave woman could not be raped by her master, and her rape by other white men was merely a trespass against her master's property. Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 153-70 (1975) (rape of black female slaves by their masters was not recognized because the women were the masters' property); Franklin & Moss, *supra*, 114 ("The rape of a female slave was regarded as a crime, but only because it involved trespassing."); Stanley Elkins, SLAVERY 59 (1976) (describing slaves as absolute possessions of their masters). "No Louisiana law made rape of a black woman, slave or free, a crime. Rape was specifically limited to white women under the state's law." Judith Kelleher Schafer, SLAVERY, THE CIVIL WAR, AND THE SUPREME COURT OF LOUISIANA 85-87 (1994).

With the end of the Civil War and emancipation came an appalling increase in the lynching of blacks, "a form of unofficial capital punishment, adjudication of guilt and execution by groups lacking the formal authority for either." Banner, *supra*, at 229; *see also* Franklin & Moss, *supra*, at 312-13 (describing the rise of the Klu Klux Klan, which "stimulated the lawlessness and violence

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1816, §§ 33-34; Ga. Acts of 1816 No. 508 § 1, Lamar, Compilation of the Laws of Georgia, 571, 804 (1821). At the end of the century, the Georgia Supreme Court explained that race might properly be considered "to rebut any presumption that might otherwise arise in favor of the accused that his intention was to obtain the consent of the female upon failure of which he would abandon his purpose to have sexual intercourse with her." *Dorsey v. State*, 108 Ga. 477, 480, 34 S.E. 135, 136, 137 (1899). Soon thereafter, the court ruled that no *Dorsey* charge was necessary when both persons were "of color, and there was no evidence as to difference in their social standing." *Washington v. State*, 138 Ga. 370, 370, 75 S.E. 253, 253 (1912).

that characterized the postwar period in the United States"). Studies have estimated that between 1880 and 1950 nearly 5,000 people were lynched, which means that "nearly six people were lynched every month for seventy years." Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 Nev. L.J. 1, 23-24 (2007). Three-quarters were black. *Id.* The racial biases found in slavery-era rape laws continued during this period as "[t]he most common public reason for lynching was that White women needed to be protected from Black rapists and attempted rapists." *Id.*

Even as the frequency of lynching decreased in the early 20th century, the scourge of racial bias continued unabated. Between 1930 and 1972, 455 people were executed for rape; 405, or 89.1 percent, were black. U.S. Dep't of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, *Capital Punishment 1930-1968* (1969). Moreover, 443 of the 455 were executed in former Confederate states. Marquart, et al., *supra*, at 39.[4]

In Alabama, Arkansas, Florida, Georgia, Louisiana, South Carolina, and Tennessee between 1945 and 1965, "among the 823 blacks convicted of rape, 110, or 13 percent, were sentenced to death; among the 442 whites convicted of rape, only 9, or 2 percent, were sentenced to death." Wolfgang & Riedel, *supra*, at 129; *see also* Deborah Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 365 n.278 (January 1997). "In

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[4] *All* of the executions took place in southern or border states or the District of Columbia. U.S. Dep't of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, *Capital Punishment 1930-1968* (1969).

Louisiana, Mississippi, Oklahoma, Virginia, West Virginia, and the District of Columbia not a single white man was executed for rape over the forty-two-year period from 1930 to 1972. Together, these jurisdictions executed 66 blacks. Arkansas, Delaware, Florida, Kentucky, and Missouri each executed 1 white man for rape since 1930, but together they have executed 71 blacks." Wolfgang & Riedel, *supra*, at 125-26.

Louisiana has executed only fourteen defendants for rape since 1941, and all fourteen were black. Burk Foster, *Struck by Lightning: Louisiana's Electrocutions for Rape in the Forties and Fifties*, available at http://www.burkfoster.com/StruckbyLightning.htm., tbl. 1. All fourteen raped whites save one -- a serial rapist of black women. *Id.* Since 1941, Louisiana has executed only one defendant for raping a child under twelve; the defendant was black and the child was white. *Id.*

These stark figures lead inexorably to the conclusion that "racial differentials are most clear among death sentences for rape." Wolfgang & Riedel, *supra*, at 125; Robert J. Hunter, et al., *The Death Sentencing of Rapists in Pre-Furman Texas (1942-1971): The Racial Dimension*, 20 Am. J. Crim. L. 313, 326 (1993) ("[C]omparison of [term-sentenced and death-sentenced offenders] confirms that a substantial difference exists in the sentencing of rapists based on race.").

In the 20th century, as before, capital punishment for rape was generally reserved for black defendants whose victims were white. A comprehensive study of the death penalty for rape in the South, including in Louisiana, from 1945 to 1965

found that "black defendants whose victims were white were sentenced to death approximately eighteen times more frequently than defendants in any other racial combination of defendant and victim." Wolfgang & Riedel, *supra*, at 126-33.

A study of all of the executions for rape carried out in Texas between 1924 and 1972 concluded:

> The majority of [death-sentenced rapists] were uneducated, young African-American males without lengthy records of property or violent crime convictions. Most had no prior prison record. ...
>
> The victims of 95 percent of the death-sentenced offenders were Anglo women, compared with 62 percent among the prison-sentenced cases. Even more dramatically, when a black offender was convicted of raping a white woman, *he was virtually assured of a death sentence.*

Marquart, et al., *supra*, at 64-65 (emphasis added). When the authors compared Texas inmates sentenced to death for rape with those sentenced to prison between 1942 and 1971, they found that "[w]hen males from an African-American background raped an Anglo female, the case was approximately thirty-five times more likely to result in capital punishment than a prison sentence." *Id.* at 56; *see also* Hunter, et al., *supra*, at 337 ("[B]lacks who raped whites stood the greatest chance of being sentenced to death.... This variation under any circumstance is extreme, and disparity based on the race of the victim was explicit.").

The Texas study also found that, in the state's rape cases that resulted in a death sentence between

1924 and 1972, 95.6% of the victims were white, 2.6% were black, and 1.8% Hispanic. Marquart, et al., *supra*, at 47-48, tbl. 3.3.[5] The study determined that during the same time period "[i]n only one case did the rape of a black female result in a death sentence and actual execution. Roscoe Gibson..., a black male, was sentenced to death in June 1962 for raping a nine-year-old black girl in Houston. He was executed on October 6, 1962." *Id.*, at 58.

In their study, Wolfgang and Riedel considered "[o]ver two dozen possibly aggravating nonracial variables," including the age of the victim(s), that might have accounted for the vastly divergent sentences received by black and white defendants. *Id.* at 132. The authors concluded that none of the variables accounted for the racial discrimination:

> It cannot be said that blacks are more frequently sentenced to death because they have a longer prior criminal record than whites, because they used more force on the victim, because they entered premises without authorization, because they used a weapon or threatened the victim with a weapon, because they had an accomplice in the commission of the rape, because they impregnated the victim,

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[5] These figures are all the more startling because "the percentage of interracial rape is a remarkably small fraction of all rapes in our society...." Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 Harv. L. Rev. 563, 594-95 (1997). Nearly seventy percent of victims of child rape are abused by parental figures, family members, day-care providers, or a friend or neighbor. *See* U.S. Department of Health & Human Services, *Child Maltreatment 2005*, at 59 tbl. 3-17 (2007).

> *because they more frequently attacked persons under age sixteen*, and so forth. All the nonracial factors in each of the states analyzed "wash out," that is, they have no bearing on the imposition of the death penalty in disproportionate numbers upon blacks. *The only variable of statistical significance that remains is race.*

Id. at 132-33 (emphasis added); *see also* Hunter, et al., *supra*, at 333 ("[T]he youth of the victim did not appear to be an extra-legal factor that influenced the sentencing decision.").

Thus, the contemporary evidence and the historical evidence demonstrate that prosecutors and juries have been, and remain, singularly unwilling to authorize the execution of rapists, including child rapists. The only exception has arisen from the historical scourge of racial animus. This animus, particularly in light of the stark racial biases and tensions which, as described below, continue to affect Louisiana and other parts of the nation, is one of many compelling reasons for this Court to refuse to countenance the use of the death penalty for rapists, including child rapists.

C. Stark racial biases and tensions continue to affect Louisiana and other parts of the nation.

Contemporary evidence of persistent racial biases and tensions in Louisiana and elsewhere in the nation, including in the criminal justice system, raises the unacceptable possibility that the historical pattern of reserving the death penalty primarily for black-on-white rape will return if this Court declines to declare capital punishment unconstitutional for all rapists, including child rapists.

Race still matters in American society. *See Parents Involved in Community Schools v. Seattle School District No. 1*, __ U.S. __, 127 S.Ct. 2738, 2788, 2791 (2007) (Kennedy, J., concurring) ("The enduring hope is that race should not matter; the reality is that too often it does"; noting that "our [nation's] highest aspirations" with regard to race relations "are yet unfulfilled"); *id.* at 2800, 2833, 2837 (Breyer, J., dissenting) (highlighting nation's "serious problems of increasing de facto segregation, troubled inner city schooling, and poverty correlated with race"). *Cf. id.* at 2738, 2768 (Thomas, J., concurring) (disparate treatment by government based on race "is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and 'provoke[s] resentment among those who believe that they have been wronged by the government's use of race'") (quoting *Adarand Constructors Inc., v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment)).

One arena that continues to experience racial bias and racial disproportionality is the criminal justice system, where racial discrimination persists in jury selection, the exercise of prosecutorial discretion, and sentencing.

The criminal justice system continues to discriminate against both black defendants convicted of rape and black rape victims. Black defendants are subjected to a disproportionate number of wrongful convictions for rape. *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 66-67 (2008) ("Many more exonerees were minorities (71%) than is typical even among average populations of rape and murder convicts. Most strikingly, 73% of

innocent rape convicts were Black or Hispanic, while one study indicates that only approximately 37% of all rape convicts are minorities." (footnotes omitted)).

Moreover, "black men are punished far more harshly than their white counterparts who are convicted of rape." Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 Harv. L. Rev. 563, 586, n.126 (1997) (citations omitted); *see also id.* at 594 ("[B]lack men still receive more severe penalties for rape. One study in Dallas found that the median sentence for a black man who raped a white woman was nineteen years, whereas a white man who raped a black woman received a ten-year sentence. Black men who rape white women receive much greater penalties than do other men who rape white women." (citations omitted)).

"The legal system also clearly discriminates against black women.... Today, men of all races who are convicted of raping black women are sentenced less severely than men convicted of raping white women." *Id.* at 594-95. As one commentator concludes:

> The disparate treatment of the black rapist and the legal indifference to black women victims helps solidify a belief that rape is only heinous if a black man rapes a white woman.

Id. at 594-95.

Additionally, racial discrimination at the critical stage of jury selection[6] remains a widespread

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[6] This Court has often recognized the harm caused by discriminatory jury selection:

problem. *Miller-El v. Dretke*, 545 U.S. at 268-69 (2005) (Breyer, J., concurring). Discriminatory jury selection is the issue in *Snyder v. Louisiana*, No. 06-10119 (U.S. Dec. 4, 2007) (pending in this Court), a case that arose in Jefferson Parish and came before this Court last fall. An *amicus* brief filed by nine ministers from the parish details the Jefferson Parish District Attorney's Office's "historical record of racial discrimination and animus in capital jury selection," and states that "the frequent use of peremptory challenges to exclude African Americans from criminal jury service has greatly undermined [their] confidence in Jefferson Parish's criminal justice system." Brief of Nine Jefferson Parish Ministers as *Amici* Curiae Supporting Petitioner at 2-3, *Snyder v. Louisiana*, No. 06-10119 (U.S. 2007). The *amicus* brief also decries the racial insensitivities of prosecutors in Jefferson Parish, including a prosecutor who joked about wanting "to seat Nazis on capital juries" and prosecutors who wore ties "depicting a grim reaper and a hangman's

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> Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, ... but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."

Miller-El v. Dretke, 545 U.S. 231, 237-38 (2005) (citations omitted). Recently, an issue of racism within a jury arose in Massachusetts, where a judge is considering what effect racist statements made by jurors during deliberations had on the verdict. Hilary Russ, *McCowen Jurors Face Bias Complaints*, Cape Cod Times, Jan. 10, 2008, available at http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20080110/NEWS/801100336/-1/SPECIAL02.

noose" during capital trials. *Id.* at 7-14.[7] Race clearly remains a significant problem in Louisiana's criminal justice system.

Louisiana is not alone in continuing to experience problems with racial bias in the administration of criminal justice. *Cf. Kimbrough v. U.S.*, 128 S.Ct. 558, 568 (2007) (noting Sentencing Commission report that crack/powder sentencing differential "'fosters disrespect for and lack of confidence in the criminal justice system' because of a 'widely-held perception' that it 'promotes unwarranted disparity based on race'" (quoting U. S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* 103 (May 2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf)). Indeed, other states that impose the death penalty on child sex offenders experience similar difficulties.

For example, recent litigation in Texas has uncovered racist emails and jokes sent and received by the Harris County District Attorney Chuck Rosenthal on his government computer.[8] Bud

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[7] In yet another parish in Louisiana, Terrebonne, a judge in 2004 was suspended from office after he attended a Halloween party "dressed as a prisoner, wearing an orange prison jumpsuit and handcuffs..., as well as a black afro wig" and black facial makeup. *In re Ellender*, 889 So.2d 225, 227 (La. 2004).

[8] Among the emails was "a photograph titled, 'Fatal Overdose,' of a black man lying on a sidewalk amid watermelon peels and Kentucky Fried Chicken containers." Ralph Blumenthal, *New Investigation in Texas E-mail Case*, N.Y Times, January 9, 2008, at A12. Another included a "joke" that "Bill Clinton was like 'having a black man as President' because 'he smoked weed'

Kennedy, *Ghosts From Yesterday's Gaffes Spookier in Writing*, Fort Worth Star-Telegram, Jan. 13, 2008, at B1. As a result, many local African American leaders demanded and obtained the District Attorney's resignation. Ralph Blumenthal, *Prosecutor, Under Fire, Steps Down in Houston*, N.Y. Times, February 16, 2008; Leslie Casimir, et al., *Black Leaders Urge Rosenthal to Step Down*, Houston Chronicle, Jan. 12, 2008, at A1. Local pastors and a Houston City Councilwoman have suggested that the emails and the District Attorney's attitude reveal latent institutional racism in the DA's office. *Id.* One pastor wondered "'[h]ow many black kids have been locked up while they laugh at us?,'" while another said that "'[t]he overpopulation of our jails and prisons is in some cases due to the way [they] were prosecuted.... And [the DA] has a negative attitude toward minorities, which makes it easier to prosecute blacks and Latinos.'" *Id.*

Oklahoma's criminal justice system also experiences racial problems. In 2005, the Oklahoma Criminal Justice Resource Center found that "[s]tatewide, a disproportionate number of black people are prosecuted," with black people "20 percent less likely to receive a community sentence... [,] 40 percent less likely to be diverted to drug court... [,] 30 percent less likely to receive a warning during traffic stops.... [,] 60 percent more likely to be stopped for record checks," and "four times more likely to be searched without consent." Devona Walker, *Oklahomans to Protest Sentences*, The Daily Oklahoman, Sept. 20, 2007.

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and 'he gets a check from the government every month.'" Bud Kennedy, *Ghosts From Yesterday's Gaffes Spookier in Writing*, Fort Worth Star-Telegram, Jan. 13, 2008, at B1.

In short, racial biases and tensions continue to exist in this nation and its criminal justice system, including Louisiana and the other states that have authorized the death penalty for child rapists. This contemporary racial animus presents a plainly unacceptable risk that the historical pattern of imposing the death penalty primarily for black-on-white rape will return unless this Court holds that capital punishment is unconstitutional for all rapists, including child rapists.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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Dated: February 2008

AMICUS CURIAE BRIEF

14

No. 07-343 3-19-08

IN THE

Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF *AMICI CURIAE* MISSOURI GOVERNOR MATT BLUNT AND MEMBERS OF THE MISSOURI GENERAL ASSEMBLY IN SUPPORT OF RESPONDENT

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Pursuant to this Court's Rule 37.2, *amici curiae* respectfully file this brief in support of respondent on the first question presented.*

INTEREST OF THE *AMICI CURIAE*

Amici curiae are Missouri Governor Matt Blunt and Members of the Missouri General Assembly. *See* App. 1a (listing *amici* Members of the Missouri General Assembly). The Missouri Constitution vests the Governor with "[t]he supreme executive power" in the State, including a duty faithfully to execute the laws, to be "a conservator of the peace throughout the state," and to recommend to the General Assembly "such measures as he shall deem necessary and expedient." Mo. Const., art. 4, §§ 1, 2, 9. Similarly, the Missouri Constitution vests the General Assembly with the legislative power in the State, including the power to define crimes and affix punishments. Mo. Const., art. 3, § 1. Together, the Governor and the General Assembly have the duty to ensure that the laws of Missouri deter and punish crime and protect the State's children.

In light of that duty, *amici* have an acute interest in the first question presented in this case: whether the Eighth Amendment to the United States Constitution categorically prohibits States from

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* Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and global consent letters evidencing such consent have been filed with the Clerk of this Court, pursuant to this Court's Rule 37.3.

authorizing the death penalty for child rape. In December 2007, before this Court granted the writ of certiorari in this case, Governor Blunt publicly proposed that Missouri authorize the death penalty for child rape. In his January 2008 State of the State report, the Governor formally recommended that the General Assembly enact legislation to this effect. Pursuant to that recommendation, legislation has been duly introduced in the General Assembly and is working its way through the legislative process. *See* Mo. S.B. 1194 (2008) (App. 2-21a); Mo. H.B. 2384 (2008) (same). *Amici* would like to have a full and fair debate on that bill, so that they can enact legislation that best protects Missouri's children.

BACKGROUND

Petitioner describes the circumstances of his particular case in great detail. *See* Pet'r Br. 6-14. But the first question presented here does not ask whether the death penalty is constitutional on the particular facts of petitioner's case. Rather, the first question presented here asks whether the death penalty is categorically unconstitutional in *all* cases of child rape where the victim does not die. Indeed, the first question presented does not even refer to petitioner at all. *See id.* at i ("Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the crime of rape of a child with the death penalty.").

Under these circumstances, it is both necessary and appropriate for this Court to appreciate the types of crimes that have sparked calls to authorize the death penalty for child rape. In Missouri, for instance, the Governor's pending legislative proposal stems in part from the recent and notorious Michael

Devlin case. In October 2002, Devlin abducted S.H., an eleven-year-old boy, who was riding his bicycle near his home in Richwoods, Missouri. For the next four years, Devlin detained and sexually abused S.H. Devlin took sexually explicit photographs and videotapes of some of his attacks and, at one point, attempted to kill the boy.

Four years later, as S.H. matured, Devlin decided to abduct a second boy. So in January 2007, Devlin kidnapped a thirteen-year-old boy, W.O., near a school bus stop. Days later, investigative leads from W.O.'s kidnapping led law enforcement officers to Devlin's apartment, where they discovered both boys.

Missouri charged Devlin with 72 counts of forcible sodomy, as well as other counts for kidnapping, assault, and attempted murder. Devlin was also indicted on federal charges for production of child pornography and for taking S.H. across state lines for purposes of a criminal sexual act. In October 2007, Devlin pleaded guilty to all counts but one in three state circuit courts and the U.S. District Court for the Eastern District of Missouri. For his federal crimes, Devlin received a sentence of 170 years' imprisonment. For most of the state counts, the Missouri courts imposed the maximum sentence available—life imprisonment—for a total of 74 life sentences (many of which were consecutive).

The Devlin case led many in Missouri, including *amici*, to question whether life imprisonment is sufficient punishment for crimes of this type. It is against this backdrop that *amici* are considering the pending legislation.

SUMMARY OF ARGUMENT

Petitioner's argument that the Eighth Amendment categorically forbids the death penalty for child rape suffers from a fundamental flaw. On the one hand, petitioner argues that "this Court's decision in *Coker v. Georgia*[, 433 U.S. 584 (1977),] precludes capital punishment for any rape in which death does not result." Pet'r Br. 19 (capitalization modified). On the other hand, petitioner argues that there is a "national consensus against punishing child rape by death," as apparently evidenced by "objective indicia of legitimacy." *Id.* at 28 (capitalization modified). But these two arguments are logically and legally intertwined: there is no way to assess whether there is a "national consensus against punishing child rape by death" without first knowing whether *Coker* foreclosed a national debate on that very issue. By definition, there cannot be a "consensus" before there has been a debate, and *Coker* has distorted any debate on this issue for a generation.

This Court should clarify in this case that *Coker* does not categorically foreclose the death penalty for child rape. Then, and only then, can there be a real debate on appropriate punishment for that crime, and the possibility of a "national consensus" on this issue. As petitioner's brief underscores, those who oppose the death penalty for child rape currently argue that the debate itself is illegitimate, on the ground that this Court in *Coker* foreclosed that debate as a matter of federal constitutional law. *Amici* disagree with petitioner on that score, given that *Coker* did not even involve child rape. But petitioner certainly cannot argue *both* that *Coker*

answered the first question presented here *and* that there is a "national consensus" on the answer to that question. Given the distorting lens of *Coker*, any such "consensus" is illusory.

As matters now stand, petitioner cannot possibly demonstrate by "objective indicia"—separate and apart from petitioner's erroneous interpretation of *Coker*—that the people of this Nation have reached a "national consensus" that the death penalty is never warranted for child rape. To the contrary, if anything, a spate of recent legislative activity (in Missouri as well as other States) underscores that no such "consensus" exists. Petitioner is essentially inviting this Court to outlaw the death penalty for child rape as a matter of raw federal judicial power. *Amici* respectfully ask this Court to decline that invitation.

ARGUMENT

This Court Should Not Foreclose A National Debate On Appropriate Punishment For Child Rape.

This case is controlled by the fundamental principle that, except to the limited extent prescribed by the Federal Constitution, States are generally free to define crimes and their punishments. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 824 (1991); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991); *Gore v. United States*, 357 U.S. 386, 393 (1958). *Amici* seek to have a debate in Missouri about whether the crime of child rape, at least in certain circumstances, warrants the death penalty. Depending on the outcome of that debate in Missouri and other States, perhaps it will be possible in the future to discern a "national consensus" one way or the other on this

controversial and emotional issue. But petitioner seeks to foreclose that debate altogether, by arguing both that current law categorically precludes the death penalty for child rape, and that a "national consensus" to the same effect already exists. Petitioner is wrong on both scores.

As an initial matter, petitioner overreads this Court's decision in *Coker*. The question there was whether a State constitutionally could impose the death penalty for the rape of "an adult woman." *See Coker*, 433 U.S. at 592 (plurality opinion) ("Th[e] question [of the constitutionality of the death penalty], *with respect to rape of an adult woman*, is now before us.") (emphasis added). This Court answered that question in the negative, based largely on "objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of *an adult woman*." *Id.* at 593 (emphasis added); *id.* at 596 ("The current judgment with respect to the death penalty for rape ... obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping *an adult woman*.") (emphasis added); *id.* at 597 ("[T]he legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping *an adult woman*.") (emphasis added).

Petitioner nonetheless insists that *Coker* "held" that the death penalty is categorically unconstitutional for the crime of rape, even where the victim is a child. Pet'r Br. 6; *see also id.* at 17 ("Punishing the crime of child rape with the death penalty cannot be squared with this Court's decision

in *Coker*."). Petitioner bases that argument on several passages in the plurality opinion in *Coker* that refer to the crime of "rape" without qualification. *See id.* at 20-21 (citing 433 U.S. at 594-95, 598-99, 600). But those passages cannot be divorced from their context, which (as the *Coker* plurality repeatedly emphasized) involved the rape of "an adult woman." 433 U.S. at 592-93, 596-97. And this Court's more recent cases only confirm this limited scope. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (characterizing *Coker* as involving the "rape of an adult woman"); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) ("[W]e have held that death is an impermissibly excessive punishment for the rape of an adult woman.") (citing *Coker*, 433 U.S. at 593-96).

Petitioner thus falls back on the assertion that the "rationale" of *Coker* necessarily encompassed child rape, quoting the plurality's observation that "'the death penalty ... is an excessive penalty for the rapist who, as such, does not take human life.'" Pet'r Br. 20 (quoting *Coker*, 433 U.S. at 598), 25 n.5, 27. But even petitioner does not contend that *Coker* held that the death penalty is categorically unconstitutional for all crimes that "do[] not take human life." *See id.* at 26 & n.6. All that *Coker* held (and all that *Coker* could have held, given the case before it) is that the death penalty is categorically unconstitutional for the rape of "an adult woman." 433 U.S. at 592-93, 596-97. Indeed, had the *Coker* plurality intended its ruling to sweep more broadly, its repeated references to the rape of "an adult woman," *id.*, would be inexplicable.

Contrary to petitioner's assertion, thus, the issue here is not whether this Court should "retreat" from *Coker*, Pet'r Br. 17, but whether this Court should extend *Coker* to categorically prohibit the death penalty for the crime of rape not only of "an adult woman," 433 U.S. at 592-93, 596-97, but also of a child. Such an extension would be permissible, under this Court's precedents, only if petitioner could carry the "heavy burden" of establishing a national consensus against the death penalty for child rape. *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989); *see also Roper*, 543 U.S. at 567; *Atkins*, 536 U.S. at 316; *Gregg v. Georgia*, 428 U.S. 153, 173-75 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

Petitioner purports to discern such a "consensus" by reference to (1) "the number of states that prohibit the death penalty" for child rape, (2) "the 'frequency of its use even where it remains on the books,'" and (3) "the direction of any change" with respect to punishing that crime. Pet'r Br. 28 (quoting *Roper*, 543 U.S. at 567). But the problem for petitioner is that it is currently impossible to discern any such "consensus" free and clear from the distorting lens of *Coker*. Indeed, petitioner himself underscores the problem by arguing at great length that *Coker* governs this issue. *See* Pet'r Br. 19-27. If this Court were ever to hold the death penalty categorically unconstitutional for the rape of a child, it should do so only after a full and fair national debate on that issue confirmed the existence of a true "national consensus" against this punishment for this crime. It certainly should not do so on the basis of an illusory "consensus" that may reflect nothing more than an erroneous interpretation of this Court's decision in *Coker*.

Indeed, this case stands in stark contrast to recent cases in which this Court has perceived a "national consensus" against the death penalty in certain circumstances. *See Roper*, 543 U.S. at 564-67 (describing consensus against death penalty for juveniles); *Atkins*, 536 U.S. at 313-16 (describing consensus against death penalty for the mentally retarded). With respect to the specific circumstances at issue in both *Roper* and *Atkins*, this Court previously had made it crystal clear that the Federal Constitution did *not* categorically preclude the application of the death penalty. *See Stanford*, 492 U.S. at 380 (holding that the Federal Constitution did not categorically preclude the death penalty for juveniles at least 16 years old); *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (holding that the Federal Constitution did not categorically preclude the death penalty for the mentally retarded). Accordingly, any State that adopted (or retained) an exclusion from the death penalty for juveniles or the mentally retarded in light of *Stanford* and *Penry* unquestionably did so of its own volition, free from federal constitutional compulsion. *Stanford* and *Penry*, in other words, cleared the path for *Roper* and *Atkins* by clarifying that the Federal Constitution did not compel States to exempt juveniles and the mentally retarded from the death penalty. To the extent that various State legislatures, free of any federal constitutional compulsion, chose to exempt juveniles and the mentally retarded from the death penalty, those legislative decisions provided evidence of a shift in the national consensus.

Precisely because petitioner is able to argue in this Court that *Coker* controls the first question presented in this case as a matter of federal

constitutional law, his simultaneous discernment of a "national consensus" against the death penalty for child rape is, at the very least, premature. Petitioner is undeniably correct that certain courts and commentators have broadly interpreted *Coker* to foreclose the death penalty in all cases of rape, or even in all cases that do not involve a person's death. *See* Pet'r Br. 22-24, 25 & n.5. But that only underscores that it is impossible to discern a "national consensus" on this issue separate and apart from an erroneous understanding of this Court's Eighth Amendment jurisprudence.

Perhaps, if this Court were to clarify in this case that *Coker* does not categorically foreclose the death penalty for child rape, a national consensus will emerge with respect to the death penalty for child rape. *Amici* seriously doubt that any such consensus would be along the lines suggested by petitioner; if anything, *amici* venture to predict that any consensus would favor the death penalty, at least under certain circumstances, for child rape. But unless and until this Court clarifies that *Coker* does not categorically foreclose the death penalty for child rape, there is simply no basis for this Court to conclude that "objective indicia overwhelmingly show that society views capital punishment as excessive punishment for child rape." Pet'r Br. 18; *see generally Thompson v. Oklahoma*, 487 U.S. 815, 848-55 (1988) (O'Connor, J., concurring in judgment) (warning against premature assessment of "national consensus" regarding death penalty in certain classes of cases); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. Rev. 1089, 1149 (2006) ("The

essential problem is that although the Court may act as if it is an independent arbitrator, its actions actually affect the very national consensus in each case that it is attempting to ascertain and reflect.").

In any event, petitioner's discussion of the various "objective indicia" of a "national consensus" is flawed on its own terms. At the outset, petitioner asserts that "[f]orty-five states *bar* [the death penalty for child rape] outright." Pet'r Br. 18 (emphasis added). That assertion is misleading at best. Petitioner apparently means to suggest that these forty-five States, including Missouri, have affirmatively rejected the death penalty for child rape. But nothing in Missouri law indicates an affirmative rejection of the death penalty for child rape. Missouri law simply does not speak to the issue one way or the other. There has been no debate in Missouri over the death penalty for child rape. *Amici* in fact wish to conduct such a debate in Missouri, but petitioner seeks to silence that debate before it starts by asking this Court to declare that a "national consensus" (supposedly including Missouri) already rejects the death penalty for child rape.

Once again, *Roper* and *Atkins* provide relevant guidance. In discerning a "national consensus" against the application of the death penalty in particular circumstances, the Court in those cases focused on States that either (1) abolished the death penalty altogether, or (2) affirmatively barred the death penalty for juveniles or the mentally retarded. *See Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 314-15. The Court certainly did not purport to discern a "national consensus" based merely on the *absence* of legislation affirmatively authorizing the death

penalty for juveniles or the mentally retarded. *See also Thompson*, 487 U.S. at 829 (plurality opinion) (putting aside States that "do not focus" on the minimum age for the death penalty, and instead focusing on the States that "have *expressly established* a minimum age in their death penalty statutes") (emphasis added).

That point is important not only because the "'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures,'" *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331), but also because there are many reasons why legislatures may not act besides disagreement with potential legislation. *See, e.g., United States v. Craft*, 535 U.S. 274, 287 (2002); *Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). Perhaps legislators in those States (like Missouri) that have not affirmatively authorized the death penalty for child rape have been focused on other issues, and have not been galvanized by shocking crimes like those revealed in the Devlin case. Or perhaps legislators erroneously believed that their hands were tied by *Coker*, or at the very least did not want to expend the resources necessary to litigate the question whether their hands were tied by *Coker*. For this reason, petitioner misses the mark by relying on legislative inaction to prove a national consensus against the death penalty for child rape. *See* Pet'r Br. 35-36 n.14. In the absence of legislation affirmatively "prohibit[ing]" the death penalty under certain circumstances, *see Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 314-15, a particular State cannot be deemed part of a "national consensus" rejecting the death penalty under those circumstances.

Thus, the fact that most of the States that authorize the death penalty in the first place have not yet extended it to child rape does not mean that those States have affirmatively rejected any such extension. Or, put differently, the fact that only a handful of States to date have taken that step does not mean that those States have departed from any national consensus to the contrary. It is, after all, virtually a truism that the States in our federal republic are the "laboratories" of democracy, *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (citing, *inter alia*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)), and a State is not to be condemned merely for taking the lead on a controversial issue, *see, e.g.*, *Ewing v. California*, 538 U.S. 11, 15, 24 (2003) (rejecting Eighth Amendment challenge to California's then-novel "three strikes" law); *see also Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (opinion of Scalia, J.); *id.* at 998-99, 1007 (opinion of Kennedy, J.). In particular, the Eighth Amendment neither precludes States from undertaking innovations in criminal law and punishment, nor dictates that any such innovations may move only in the direction of ever-greater leniency. *See, e.g.*, *Gregg*, 428 U.S. at 176 (opinion of Stewart, Powell, and Stevens, JJ.).

For similar reasons, petitioner also misses the point by arguing that the actions of prosecutors and sentencing juries provide "objective indicia" of a national consensus against the death penalty for child rape. *See* Pet'r Br. 33-34. The short answer to that argument is that the available data are far too limited to warrant any such sweeping conclusion. As noted above, the various state statutes authorizing

the death penalty for child rape are very recent. Because there is virtually no track record one way or the other, petitioner cannot remotely carry his "heavy burden" of proof on this score. *Stanford*, 492 U.S. at 373.

Indeed, if anything, recent legislative activity among the States strongly suggests the absence of a "national consensus" against the death penalty for child rape, because a clear trend has emerged in favor of such punishment. As petitioner himself concedes, since Louisiana enacted its statute in 1995, at least four other States have enacted legislation similarly authorizing the death penalty for child rape under certain circumstances (and three of those enactments have taken place just within the past two years). *See* Mont. Code § 45-5-503(i) (1997); S.C. Code § 16-3-655(C)(1) (2006); 10 Okl. St. § 7115(I) (2006); Tex. Penal Code § 12.42(c)(3) (2007); *cf.* Ga. Code § 16-6-1 (1999). In addition, legislation that would authorize the death penalty for child rape is currently pending not only in Missouri, but also in Colorado (Colo. S.B. 195) (2008)), Mississippi (Miss. S.B. 2596 (2008)), Alabama (Ala. H.B. 456 (2008)), and Tennessee (Tenn. S.B. 0157 (2007)). It would be unorthodox, to say the least, for this Court to discern a "national consensus" on an issue where contrary legislation is currently pending in no fewer than five States. *See, e.g.*, *Atkins*, 536 U.S. at 315 ("[I]t is not so much the number of ... States that is significant, but the consistency of the direction of change.").

Petitioner asserts, however, that "the two states that had capital child rape statutes prior to *Coker* [Florida and Mississippi] have disallowed the death penalty for the crime." Pet'r Br. 35. Again, that

assertion is misleading at best. Neither Florida nor Mississippi "disallowed" the death penalty for child rape by concluding as a matter of state law that the penalty was excessive or unwarranted. To the contrary, the Florida Supreme Court invalidated the statute authorizing the death penalty for child rape because it erroneously believed that *Coker* compelled that result. *See Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981) ("The reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."). And the Mississippi Supreme Court invalidated the Mississippi statute on the ground that it conflicted with the Mississippi statute governing capital trials, *see Leatherwood v. State*, 548 So. 2d 389, 403 (Miss. 1989), not because of any normative judgment that such punishment is unwarranted. Indeed, Mississippi is currently considering legislation to address that conflict and reinstate the death penalty for child rape. *See* Miss. S.B. 2596 (2008).

To be sure, petitioner and his *amici* make a variety of policy arguments against the death penalty for child rape. *See* Pet'r Br. 38-40; *see also, e.g.*, Br. of Nat'l Assoc. of Social Workers *et al.* as *Amici Curiae* 6-26; Br. of Nat'l Assoc. of Criminal Defense Attorneys *et al.* as *Amici Curiae* 7-21. *Amici* here do not lightly discount all of those policy arguments, such as the argument that evidence from children may present special reliability concerns. *See* Pet'r Br. 39-40. But petitioner and his *amici* are directing these policy arguments to the wrong forum in the first instance: these arguments present

"complex factual issue[s] the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Gregg*, 428 U.S. at 186 (opinion of Stewart, Powell, and Stevens, JJ.). There is no reason to think that petitioner's various policy arguments, whatever their merits, compel this Court to hold that the Federal Constitution categorically forecloses state legislatures from debating these various policy arguments. Needless to say, whatever the results of such debates, the courts will always sit to ensure a defendant receives a fundamentally fair trial in every individual case.

In the final analysis, it is neither necessary nor appropriate for this Court to silence a debate in Missouri and other States on the death penalty for child rape before that debate has even been joined. Accordingly, this Court should answer the first question presented in the affirmative.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Louisiana Supreme Court at least insofar as the Eighth Amendment's Cruel and Unusual Punishment Clause does not categorically preclude the death penalty for child rape.

Respectfully submitted,

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March 19, 2008

APPENDIX

AMICI MEMBERS OF THE MISSOURI GENERAL ASSEMBLY

Senator Jack Goodman
Senator Luann Ridgeway
Representative Jason Brown
Representative Stan Cox
Representative Jane Cunningham
Representative Gary Dusenberg
Representative Ed Emery
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Representative Marilyn Ruestman
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Representative Shane Schoeller
Representative Bryan Stevenson
Representative Brian Yates

SECOND REGULAR SESSION

SENATE BILL NO. 1194

94TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR GOODMAN.

Read 1st time February 26, 2008, and ordered printed.

TERRY L. SPIELER, Secretary.

5213S.02I

AN ACT

To repeal sections 565.005, 565.006, 565.035, 565.040, 566.030, and 566.060, RSMo, and to enact in lieu thereof nine new sections relating to punishment for certain crimes against a child under the age of twelve, with penalty provisions.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 565.005, 565.006, 565.035, 565.040, 566.030, and 566.060, RSMo, are repealed and nine new sections enacted in lieu thereof, to be known as sections 565.005, 565.006, 565.035, 565.040, 565.425, 565.430, 565.435, 566.030, and 566.060, to read as follows:

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

565.005. 1. At a reasonable time before the commencement of the first stage of any trial of murder in the first degree, **forcible rape of a child under the age of twelve, or forcible sodomy of a child under the age of twelve,** at which the death penalty is not waived, the state and defendant, upon request and without order of the court, shall serve counsel of the opposing party with:

(1) A list of all aggravating or mitigating circumstances as provided in [subsection 1 of] section 565.032 **for murder in the first degree or section 565.415 for forcible rape of a child under the age of twelve or forcible sodomy of a child under the age of twelve,** which the party intends to prove at the second stage of the trial;

(2) The names of all persons whom the party intends to call as witnesses at the second stage of the trial;

(3) Copies or locations and custodian of any books, papers, documents, photographs or objects which the party intends to offer at the second stage of the trial. If copies of such materials are not supplied to opposing counsel, the party shall cause them to be made available for inspection and copying without order SB 1194 of the court.

2. The disclosures required in subsection 1 of this section are supplemental to those required by rules of the supreme court relating to a continuing duty to disclose information, the use of matters disclosed, matters not subject to disclosure, protective orders, and sanctions for failure to comply with an applicable discovery rule or order, all of which shall also apply to any disclosure required by this section.

565.006. 1. At any time before the commencement of the trial of a homicide [offense], **forcible rape of a child under the age of twelve, or forcible sodomy of a child under the age of twelve,** the defendant may, with the assent of the court, waive a trial by jury and agree to submit all issues in the case to the court, whose finding shall have the force and effect of a verdict of a jury. Such a waiver must include a waiver of a trial by jury of all issues and offenses charged in the case, including the punishment to be assessed and imposed if the defendant is found guilty.

2. No defendant who pleads guilty to a homicide [offense], **forcible rape of a child under the age of twelve, or forcible sodomy of a child under the age of twelve,** or who is found guilty of a homicide [offense], **forcible rape of a child under the age of twelve, or forcible sodomy of a child under the age of twelve** after trial to the court without a jury shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state.

3. If a defendant is found guilty of murder in the first degree, **forcible rape of a child under the age of twelve, or forcible sodomy of a child under the age of twelve** after a jury trial in which the state has not waived the death penalty, the defendant may not waive a jury trial of the issue of the punishment to be imposed, except by agreement with the state and the court.

4. Any waiver of a jury trial and agreement permitted by this section shall be entered in the court record.

565.035. 1. Whenever the death penalty is imposed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court together with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.

2. The supreme court of Missouri shall consider the punishment as well as any errors enumerated by way of appeal.

3. With regard to the sentence, the supreme court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of

section 565.032 **or subsection 2 of section 565.435** and any other circumstance found;

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

4. Both the defendant and the state shall have the right to submit briefs within the time provided by the supreme court, and to present oral argument to the supreme court.

5. The supreme court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor; or

(3) Set the sentence aside and remand the case for retrial of the punishment hearing. A new jury shall be selected or a jury may be waived by agreement of both parties and then the punishment trial shall proceed in accordance with this chapter, with the exception that the evidence of the guilty verdict shall be admissible in the new trial together with the official transcript of any testimony and evidence properly admitted in each stage of the original trial where relevant to determine punishment.

6. There shall be an assistant to the supreme court, who shall be an attorney appointed by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed after May 26, 1977, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant. The court shall be authorized to employ an appropriate staff, within the limits of appropriations made for that purpose, and such methods to compile such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence. The office of the assistant to the supreme court shall be attached to the office of the clerk of the supreme court for administrative purposes.

7. In addition to the mandatory sentence review, there shall be a right of direct appeal of the conviction to the supreme court of Missouri. This right of appeal may be waived by the defendant. If an appeal is taken, the appeal and the sentence review shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

565.040. 1. In the event that the death penalty provided in this chapter is held to be

unconstitutional, any person convicted of murder in the first degree, **forcible rape of a child under the age of twelve, or forcible sodomy of a child under the age of twelve** shall be sentenced by the court to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for resentencing or retrial of the punishment pursuant to subsection 5 of section 565.036.

2. In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.

565.425. 1. Except as provided in subsections 2, 3, and 4 of this section, no forcible rape of a child under the age of twelve offense may be tried together with any offense other than forcible rape of a child under the age of twelve

and no forcible sodomy of a child under the age of twelve offense may be tried together with any offense other than forcible sodomy of a child under the age of twelve. In the event of a joinder of forcible rape of a child under the age of twelve offenses or forcible sodomy of a child under the age of twelve offenses, all offenses charged which are supported by the evidence in the case shall, when requested by one of the parties or the court, be submitted to the jury or, in a jury-waived trial, considered by the judge.

2. A count charging any offense of forcible rape of a child under the age of twelve of a particular individual may be joined in an indictment or information and tried with one or more counts charging alternatively any other forcible rape of a child under the age of twelve or offense other than forcible rape of a child under the age of twelve committed against that individual. A count charging any offense of forcible sodomy of a child under the age of twelve of a particular individual may be joined in an indictment or information and tried with one or more counts charging alternatively any other forcible sodomy of a child under the age of twelve or offense other than forcible sodomy of a child under the age of twelve committed against that individual. The state shall not be required to make an election as to the alternative count on which it will proceed. This subsection in no way limits the right to try in the conjunctive, where they

are properly joined under subsection 1 of this section, either:

(1) Separate offenses other than forcible rape of a child under the age of twelve or separate offenses of forcible rape of a child under the age of twelve committed against different individuals;

(2) Separate offenses other than forcible sodomy of a child under the age of twelve or separate offenses of forcible sodomy of a child under the age of twelve committed against different individuals.

3. (1) When a defendant has been charged and proven before trial to be a prior offender pursuant to chapter 558, RSMo, so that the judge shall assess punishment and not a jury for an offense other than forcible rape of a child under the age of twelve, that offense may be tried and submitted to the trier together with any forcible rape of a child under the age of twelve charge with which it is lawfully joined. In such case the judge shall assess punishment on any offense joined with a forcible rape of a child under the age of twelve charge according to law and, when the trier is a jury, it shall be instructed upon punishment on the charge of forcible rape of a child under the age of twelve in accordance with section 565.430.

(2) When a defendant has been charged and proven before trial to be a prior offender pursuant to chapter 558, RSMo, so that the

judge shall assess punishment and not a jury for an offense other than forcible sodomy of a child under the age of twelve, that offense may be tried and submitted to the trier together with any forcible sodomy of a child under the age of twelve charge with which it is lawfully joined. In such case the judge shall assess punishment on any offense joined with a forcible sodomy of a child under the age of twelve charge according to law and, when the trier is a jury, it shall be instructed upon punishment on the charge of forcible sodomy of a child under the age of twelve in accordance with section 565.430.

4. When the state waives the death penalty for a forcible rape of a child under the age of twelve offense or forcible sodomy of a child under the age of twelve offense, that offense may be tried and submitted to the trier together with any other charge with which it is lawfully joined.

565.430. 1. Where forcible rape of a child under the age of twelve or forcible sodomy of a child under the age of twelve is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases with a single stage trial in which guilt and punishment are submitted together.

2. Where forcible rape of a child under the age of twelve or forcible sodomy of a child

under the age of twelve is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage, the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage. If an offense is charged other than forcible rape of a child under the age of twelve in a count together with a count of forcible rape of a child under the age of twelve, the trial judge shall assess punishment on any such offense according to law, after the defendant is found guilty of such offense and after he finds the defendant to be a prior offender pursuant to chapter 558, RSMo. If an offense is charged other than forcible sodomy of a child under the age of twelve in a count together with a count of forcible sodomy of a child under the age of twelve, the trial judge shall assess punishment on any such offense according to law, after the defendant is found guilty of such offense and after he finds the defendant to be a prior offender pursuant to chapter 558, RSMo.

3. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of forcible rape of a child under the age of twelve or forcible sodomy of a child under the age of twelve, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and

mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.435, may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the victim and the impact of the crime upon the family of the victim and others. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury, it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded; or

(2) If the trier does not find beyond a reasonable doubt at least one of the aggravating circumstances set out in subsection 2 of section 565.435; or

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the mitigating circumstances listed in subsection 3 of section 565.435, which is sufficient to outweigh the evidence in

aggravation of punishment found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. If the trier is a jury it shall be so instructed. If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.435 which it found beyond a reasonable doubt. If the trier is a jury, it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for forcible rape of a child under the age of twelve or forcible sodomy of a child under the age of twelve.

4. Upon written agreement of the parties and with leave of the court, the issue of the defendant's mental retardation may be taken up by the court and decided prior to trial without prejudicing the defendant's right to have the issue submitted to the trier of fact as provided in subsection 3 of this section.

5. As used in this section, the terms "mental retardation" or "mentally retarded" refer to a

condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

6. The provisions of this section shall only govern offenses committed on or after August 28, 2008.

565.435. 1. In all cases of forcible rape of a child under the age of twelve or forcible sodomy of a child under the age of twelve for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he or she shall include in his or her instructions to the jury for it to consider:

(1) Whether an aggravating circumstance or circumstances enumerated in subsection 2 of this section is established by the evidence beyond a reasonable doubt; and

(2) If an aggravating circumstance or circumstances is proven beyond a reasonable doubt, whether the evidence as a whole justifies a sentence of death or a sentence of life imprisonment without eligibility for probation, parole, or release except by act of the governor. In determining the issues

enumerated in this subdivision and subdivision (1) of this subsection, the trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment, including evidence received during the first stage of the trial and evidence supporting any of the aggravating or mitigating circumstances set out in subsections 2 and 3 of this section. If the trier is a jury, it shall not be instructed upon any specific evidence which may be in aggravation or mitigation of punishment, but shall be instructed that each juror shall consider any evidence which he or she considers to be aggravating or mitigating.

2. Aggravating circumstances for a forcible rape of a child under the age of twelve offense or forcible sodomy of a child under the age of twelve offense shall be limited to the following:

(1) The offense was committed by a person with a prior record of pleading to or being found guilty of forcible rape of a child under the age of twelve or forcible sodomy of a child under the age of twelve, or the offense was committed by a person who has pleaded guilty to or been found guilty of one or more serious assaultive criminal offenses;

(2) The offense was committed while the offender was engaged in the commission or attempted commission of another unlawful rape or sodomy;

(3) The offender by his act of forcible rape of a child under the age of twelve or forcible

sodomy of a child under the age of twelve knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the forcible rape or forcible sodomy or another;

(5) The offender caused or directed another to commit forcible rape of a child under the age of twelve or forcible sodomy of a child under the age of twelve or committed forcible rape of a child under the age of twelve or forcible sodomy of a child under the age of twelve as an agent or employee of another person;

(6) The raped or sodomized individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was raped or sodomized as a result of his or her status as a witness or potential witness;

(7) The offense was committed during the commission of a crime which is part of a pattern of criminal street gang activity as defined in section 578.421, RSMo;

(8) The offense was committed outrageously, wantonly vile, horribly, or

inhumanely in that it involved torture or depravity of mind;

(9) The offense was committed by a person in, or who escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The offense was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of homicide, burglary, robbery, kidnapping or any felony offense under chapter 195, RSMo.

3. Mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired;

(4) The age of the defendant at the time of the crime;

(5) The defendant acted under the substantial domination of another person.

566.030. 1. A person commits the crime of forcible rape if such person has sexual intercourse with

another person by the use of forcible compulsion. Forcible compulsion includes the use of a substance administered without a victim's knowledge or consent which renders the victim physically or mentally impaired so as to be incapable of making an informed consent to sexual intercourse.

2. Forcible rape or an attempt to commit forcible rape is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless:

(1) In the course thereof the actor inflicts serious physical injury or displays a deadly weapon or dangerous instrument in a threatening manner or subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, in which case the authorized term of imprisonment is life imprisonment or a term of years not less than fifteen years; or

(2) The victim is a child less than twelve years of age, in which case [the required term of imprisonment is life imprisonment without eligibility for probation or parole until the defendant has served not less than thirty years of such sentence or unless the defendant has reached the age of seventy-five years and has served at least fifteen years of such sentence. Subsection 4 of section 558.019, RSMo, shall not apply to the sentence of a person who has pleaded guilty to or has been found guilty of forcible rape when the victim is under the age of twelve, and "life imprisonment" shall mean imprisonment for the duration of a person's natural life for the purposes of this section],

the punishment shall be either death or life imprisonment without eligibility for probation, parole, or release except by act of the governor; except that, if a person has not reached his or her eighteenth birthday at the time of the commission of the crime, the punishment shall be life imprisonment without eligibility for probation, parole, or release except by an act of the governor.

3. No person found guilty of or pleading guilty to forcible rape or an attempt to commit forcible rape shall be granted a suspended imposition of sentence or suspended execution of sentence.

566.060. 1. A person commits the crime of forcible sodomy if such person has deviate sexual intercourse with another person by the use of forcible compulsion. Forcible compulsion includes the use of a substance administered without a victim's knowledge or consent which renders the victim physically or mentally impaired so as to be incapable of making an informed consent to sexual intercourse.

2. Forcible sodomy or an attempt to commit forcible sodomy is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless:

(1) In the course thereof the actor inflicts serious physical injury or displays a deadly weapon or dangerous instrument in a threatening manner or subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, in which case the authorized term of imprisonment is

life imprisonment or a term of years not less than ten years; or

(2) The victim is a child less than twelve years of age, in which case [the required term of imprisonment is life imprisonment without eligibility for probation or parole until the defendant has served not less than thirty years of such sentence or unless the defendant has reached the age of seventy-five years and has served at least fifteen years of such sentence. Subsection 4 of section 558.019, RSMo, shall not apply to the sentence of a person who has pleaded guilty to or has been found guilty of forcible sodomy when the victim is under the age of twelve, and "life imprisonment" shall mean imprisonment for the duration of a person's natural life for the purposes of this section], **the punishment shall be either death or life imprisonment without eligibility for probation, parole, or release except by act of the governor; except that, if a person has not reached his or her eighteenth birthday at the time of the commission of the crime, the punishment shall be life imprisonment without eligibility for probation, parole, or release except by an act of the governor**.

3. No person found guilty of or pleading guilty to forcible sodomy or an attempt to commit forcible sodomy shall be granted a suspended imposition of sentence or suspended execution of sentence.

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IN THE

Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

BRIEF *AMICI CURIAE* OF LEADING BRITISH LAW ASSOCIATIONS, SCHOLARS, QUEEN'S COUNSEL AND FORMER LAW LORDS IN SUPPORT OF PETITIONER PATRICK KENNEDY

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INTEREST OF AMICI CURIAE[1]

This Court has stated that the "[t]he United Kingdom's experience bears particular relevance" to its analysis of the cruel and unusual punishment clause of the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 577 (2005). As leading British law associations, scholars, Queen's Counsel and former Law Lords, *amici* are particularly well placed to advise the Court with regard to the United Kingdom's experience in abolishing the death penalty for rape.

In addition, this Court has repeatedly taken note of other nations' practices in considering the application of the death penalty to categories of offenses and categories of offenders. Several individual *amici* have published widely on international law, and one has written a treatise on the application of the death penalty worldwide. Law association *amici* are likewise involved in efforts to strengthen the international rule of law. In this regard, and as members of the international community, *amici* have a special interest in ensuring

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

the Court is provided with accurate data regarding international norms and state practices relating to the application of the death penalty.

A complete list of the *amici* is included in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

The nations of the world do not speak with one voice when it comes to the debate over the death penalty's efficacy or morality. Although 135 nations have abolished the death penalty in law or in practice, sixty-two nations continue to sentence offenders to death. Amnesty International, Death Penalty: Abolitionist and Retentionist Countries (Sept. 19, 2007), http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries (last visited Feb. 17, 2008). Nonetheless, there is an overwhelming international consensus regarding certain aspects of the death penalty's *application*. Thus, as this Court recognized in *Roper*, virtually all of the world's nations—including those that are aggressive proponents of capital punishment—no longer execute juvenile offenders. 543 U.S. at 577. Likewise, the vast majority of nations disallow the execution of mentally retarded offenders. *See Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) ("[W]ithin the world community, the imposition of the death penalty

for crimes committed by mentally retarded offenders is overwhelmingly disapproved."). There is an equally strong international consensus against the application of the death penalty in the case at bar.

This Court has repeatedly recognized that the views held by "other nations that share our Anglo-American heritage, and by the leading members of the Western European community" are relevant to its analysis of the Eighth Amendment's application. *Thompson v. Oklahoma*, 487 U.S. 815, 830 & n.31 (1988) (Stevens, J., concurring). And in *Roper*, the Court emphasized that "[t]he United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins." 543 U.S. at 577. In the United Kingdom, the death penalty for rape—including the rape of a child—was abolished in 1841, more than one hundred years before the death penalty was abolished for all crimes.

The United Kingdom's experience is consistent with international norms regarding the application of the death penalty. First, Louisiana's expansion of the death penalty to the crime of rape violates the principle that retentionist nations may not extend the death penalty to crimes to which it did not previously apply, and its corollary that nations should strive to progressively reduce the number of crimes for which the death penalty may be imposed. Second, the laws and practices of the international community confirm that the imposition of the death penalty for the crime

of child rape is considered an excessive punishment. Taken together, these sources of international law demonstrate that Louisiana's expansion of the death penalty to the crime of child rape is inconsistent with the weight of world opinion—a factor this Court has repeatedly found "instructive" in its Eighth Amendment analysis.[2]

ARGUMENT

I. Long Before the United Kingdom Abolished the Death Penalty, it Eliminated the Death Penalty For the Crime of Rape.

In *Roper*, the Court found it significant that the United Kingdom had abolished the juvenile death

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[2] *Roper*, 543 U.S. at 578 (finding that the "opinion of the world community, while not controlling . . . provide[s] respected and significant confirmation" for the conclusion that the execution of juvenile offenders violates the Eighth Amendment); *Atkins*, 526 U.S. at 316 n.21 (noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved," and finding that "[a]lthough these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion"); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens J., concurring) (noting international opposition to execution of defendants who were younger than 16 when their crimes were committed); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (considering international opinion regarding felony murder).

penalty decades before total abolition, having "recognized the disproportionate nature of the juvenile death penalty." 543 U.S. at 577. Long before the United Kingdom eliminated the juvenile death penalty, however, it abolished the death penalty for the crime of rape. Specifically, the death penalty for all forms of rape was abolished in 1841, and after 1861, murder was the only offense against a person for which an individual could be executed in the United Kingdom. The removal of non-murder offenses did not reflect any general concerns about the use of the death penalty; indeed, many individuals continued to be executed in the United Kingdom.[3] Instead, it was part of a general narrowing of the classes of offenses to which the death penalty could apply and a recognition that the execution of individuals who did not cause death was excessive and inconsistent with evolving standards of decency.

A. The United Kingdom Abolished the Death Penalty for All Forms of Rape in 1841 as Part of a General Narrowing of the Classes of Offenses to Which the Death Penalty Applied

The United Kingdom abolished the death penalty for murder in 1965. Murder (Abolition of Death Penalty) Act, 1965, c. 71, § 1(1) (Eng.). Long

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[3] For example, between 1900 and 1949, 755 people were executed for murder. THE REPORT OF THE ROYAL COMM. ON CAPTIAL PUNISHMENT, 1949–1953 REPORT, 1953, [Cmd.] 8932, Appendix 3.

before total abolition, however, the United Kingdom had progressively limited the categories of offenses and offenders to which the death penalty should apply. For the crime of rape (including the rape of a child), the death penalty was abolished in 1841[4]—over 125 years before the death penalty was finally abolished for murder.[5]

At the start of the 19th century, over 200 offenses were potentially punishable by death.[6] Around that

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[4] Substitution of Punishments of Death Act, 1841, 4 & 5 Vict., c. 56, § 3 (Eng.).

[5] Other common law nations, such as Canada and Australia, followed a similar pattern in the decades leading to total abolition. In 1954, Canada abolished the death penalty for rape. *Rudolph v. Alabama*, 375 U.S. 889, 891 n.5 (1963) (Goldberg, J. dissenting from denial of certiorari) ("In Canada, for example, the death sentences was rarely imposed for rape, even prior to its formal abolition in 1954."). The application of the death penalty was further limited over the next few decades, until Canada finally removed all references to the death penalty from domestic law in 1998. *See* Amnesty International, The Death Penalty in Canada: Twenty Years of Abolition 2000, http://www.amnesty.ca/deathpenalty/canada.php (last visited Feb. 17, 2008). In Australia, the death penalty for rape was abolished in most states by the late nineteenth century—several decades before total abolition. *See* JOCK MCCULLOCH, BLACK PERIL, WHITE VIRTUE: SEXUAL CRIME IN SOUTHERN RHODESIA, 1902–1935, AT 55 (2000); THE WAKEFIELD COMPANION TO SOUTH AUSTRALIAN HISTORY 135 (2001).

[6] The number of executions was also very high. In one year, 1785, ninety-seven people were put to death in London and Middlesex alone. 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL

time, however, the nation began to reconsider the application of the death penalty to such a wide range of offenses. Public debates centered on the inhumanity of the sheer number of capital statutes, the question of whether the death penalty for non-murder offenses was effective as a deterrent and necessary at all[7], and the uncertain and arbitrary nature of punishment in a system where only a fraction of those convicted were sentenced to die.

The UK Parliament responded by significantly narrowing the range and number of offenses to which the death penalty applied. In 1823, the Judgment of Death Act gave judges the power to commute the death penalty for all capital crimes except treason and murder. Judgment of Death Act, 1823, 4 Geo. 4, c. 48, § 1 (Eng.). And in 1832, punishment of death was removed from two-thirds of capital crimes. The Punishment of Death, Etc. Act, 1832, 2 & 3 Will. 4, c. 62, Preamble (Eng.). For example, the death penalty

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LAW AND ITS ADMINISTRATION FROM 1750: THE MOVEMENT FOR REFORM 147 (1948). This can be contrasted with, for example, the years 1947–1949 when a total of 35 people were executed in the United Kingdom. THE REPORT OF THE ROYAL COMM. ON CAPITAL PUNISHMENT, 1949-1953 REPORT, 1953, [Cmd.] 8932, Appendix 3.

[7] In 1837, William Ewart stated in the House of Commons: "another reason why murder only should be punished with death was that by the continuance of capital punishment in other cases an inducement was given to a criminal to put an end to the testimony against him by the absolute destruction of the person he had robbed." 38 PARL. DEB., H.C. (3d ser.) (1837) 910.

for coining[8] and shoplifting, as well as sheep, cattle and horse-stealing, was abolished at that time. *Id.*, §1.

In 1833, Parliament appointed the Criminal Law Commissioners to reform the criminal justice system of England and Wales. 4 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: GRAPPLING FOR CONTROL 310 (1968). In their report, the Commissioners advocated a rationalization of the law relating to violent offenses and a substantial reduction in the number of crimes to which the death penalty applied. CRIMINAL LAW COMMISSION, SECOND REPORT ON PRISONERS' COUNSEL AND THE DEATH PENALTY, 1836, H.C. 36, at 183. The Commissioners stated that it was contrary to the principles of criminal jurisprudence to punish indiscriminately offenders whose crimes differed so widely, not only with respect to moral guilt, but also in their harmful consequences to society. *Id.* at 1, ¶ 3.

They observed that while a wide range of offenses were death-eligible, very few offenders were actually put to death. *Id.* at 1, ¶ 6. The Commissioners further noted that the earlier repeal of a number of capital punishments had not resulted in any subsequent increase in the number of offenses committed, but had in fact resulted in a decrease. *Id.* at 3, ¶ 2. Consequently, in 1837, Parliament abolished

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[8] Coinage Offenses Act, 1832, 2 & 3 Will. 4, c. 34, Preamble (Eng.).

the death penalty for offenses such as the forgery of wills,[9] burglary, and theft from a dwelling house.[10] Burglary Act, 1837, 7 Will. 4 & 1 Vict., c. 84, §§ 3 & 5 (Eng.).

The continued narrowing of offenses to which the death penalty applied then led to the discontinuance of the imposition of the death penalty for the crime of rape. At that time, under English law the death penalty was imposed for the crimes of "rape" and "unlawfully and carnally knowing and abusing any girl under the age of ten years." *See* Offenses Against the Person Act, 1828, 9 Geo. 4, c. 31, §§ 16 & 17 (Eng.). By 1840, after the death penalty was abolished for a range of offenses against the person, the government decided to abolish the death penalty for rape and carnal knowledge – based in part on concerns about wrongful convictions. Indeed, in parliamentary debate on the abolition of the death penalty for rape, it was said that "there were no capital convictions which so little satisfied the public mind as those for rape, or in which doubts were so frequently expressed of the guilt of a prisoner after his execution." 57 PARL. DEB., H.C. (3d ser.) (1841) 1420.

In fact, this was an area where penal practice had run ahead of legislation. Even in rapes by more than one person, which the Criminal Law Commissioners had regarded as among the most

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[9] Forgery Act, 1837, 7 Will. 4 & 1 Vict., c. 84, § 1 (Eng.).

aggravated cases, judges as a general rule recommended commutation of the death penalty.[11] Indeed, the last execution for rape had actually occurred some years earlier, in 1836, when Richard Smith was hanged in Nottingham.[12] Radzinowicz points out that

> the Home Office was besieged by applications in favorem vitae and city and county magistrates sent in memorials rather than become accessory to a punishment they regarded as excessive. One such protest had been submitted in a case which the memorialists themselves admitted

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[11] Even during the time the death penalty was permitted for rape, the execution rate was low. Out of 678 offenders executed in London and Middlesex in the 23 years from 1749 to 1771, only 2 had committed rape. 1 RADZINOWICZ, *supra* note 6, at 148. The execution rate from within the number of persons charged with rape was also low. In 1810, of 24 offenders committed for trial for rape, only one was executed. *Id.* at 155. The death penalty was clearly seen as inappropriate for rape offenses.

[12] In 1837, with the capital code collapsing, two rapists were sentenced to death by Coleridge, J. at Chester assizes. They fainted in court when Coleridge told them that their crime "still remained and he supposed always would remain, punishable with death." The judge would have hanged if he could; had he succeeded, these would have been the last men hanged for rape in England. They were saved by public petitions. Some fifty people pleaded that the men were hitherto of good character, that the evidence against them was murky, and above all that the punishment was "far disproportionate to the offence." V. A. C. GATRELL, THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770–1868, at 501–02 (1994).

"had been committed under the most revolting circumstances of violence and cruelty." It was only the knowledge that those convicted of rape were seldom hanged that induced juries to convict even one in three of those charged. In earlier years, when some had been executed, the convictions had dropped as low as one in fourteen. This was pre-eminently an offense for which the death penalty was generally considered inappropriate and in which its very existence increased the chances of acquittal and reduced the hope of deterrence.[13]

In Parliamentary debates, the majority view was that the death penalty was simply inappropriate for rape. Juries were unwilling to convict because of it. It was said that "where there had been executions in one year for rape, the proportions of convictions in the next year, for the offense, were less; thus showing, that there was a feeling certainly against the execution of the capital sentence" and that "there was a repugnance to a verdict in those cases [rape] which would end in taking away life." 57 PARL. DEB., H.C. (3d ser.) (1841) 51–52. Another objection "against the punishment of death [for rape] was its irrevocability. [Mr. C Buller] thought there was no offense to which they should be more careful of attaching irrevocable punishment than this, because there was no offense in which it was so difficult to get at satisfactory evidence." 57 PARL. DEB., H.C. (3d ser.) (1840) 745. A further reason for

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[13] 4 RADZINOWICZ, *supra*, at 322.

abolishing the death penalty for rape was stated as: "what . . . had to [be] determine[d] was, which was the greater evil, rape or murder. Capital punishment for the former would incite an individual to commit the latter." *Id.*

Following considerable debate in both Houses of Parliament, in which the seriousness of the crime was fully acknowledged, Parliament voted to abolish the death penalty for all forms of rape in 1841. *See* 58 PARL. DEB., H.C. (3d ser.) (1841) 1570; *see also* The Punishment of Death Act, 1832, 2 & 3 Will. 4, c. 62 (Eng.).

The narrowing of capital offenses continued. By 1861, a person could be executed only if he or she had committed murder or a specific offense against the state. *See* Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, § 1 (Eng.); *see* 4 LEON RADZINOWICZ, *supra* note 6, at 342. This reflected, in the eyes of the United Kingdom, the unique seriousness and harm caused by intentionally ending a person's life or acting against and causing harm to the country's interests. Indeed, an attempt, a few years earlier, by a member of the House of Lords to reinstate the death penalty for certain aggravated cases of rape was rejected by the legislature. 146 PARL. DEB., H.L. (3d ser.) (1857) 1354.

B. After the Abolition of Rape as a Capital Offense, the United Kingdom Continued to Narrow the Application of the Death Penalty and Rejected Efforts to Extend its Application

While the death penalty remained for murder and certain offences against the state[14] during the remainder of the 19th century and majority of the 20th century, the United Kingdom continued to gradually limit the types of offenses and types of offenders for which, and to whom, the death penalty applied. One key area in which the use of the death penalty was limited in the United Kingdom was in its use against young people and the mentally impaired. These are, of course, categories of offenders which this Court has recently held that it is unconstitutional to execute. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).

But it was over 50 years *after* capital rape was abolished that the United Kingdom first moved to distinguish between certain categories of murderers. The United Kingdom prohibited the execution of children under the age of 16 in 1908. Children Act, 1908, 8 Edw. 7, c. 67, § 103 (Eng.). The execution of persons under the age of 18 was prohibited in 1933.

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[14] Arson in a royal dockyard, *see* Dockyards Protection Act, 1772, 12 Geo. 3, c. 24, § 1 (Eng.), espionage, *see* Naval Discipline Act, 1860, 23 & 24 Vict., c. 23, § 1 (Eng.), piracy with violence, *see* Piracy Act, 1837, 7 Will. 4 & 1 Vict., c. 88, § 2 (Eng.), and high treason, *see* Treason Act, 1814, 54 Geo. 3, c. 146, § 2 (Eng.).

Children and Young Persons Act, 1933, 23 & 24 Geo. 5, c. 12, § 53 (Eng.). And in 1957, by way of the Homicide Act, the defense of diminished responsibility was introduced, whereby a defendant who could prove he suffered from an abnormality of mind and a substantial impairment of moral responsibility would be convicted of manslaughter, which did not carry the death penalty. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 2 (Eng.). Thus, while the United States' abolition of the death penalty for juveniles and the mentally retarded is consonant with the historical application of the death penalty in the United Kingdom, Louisiana's expansion of the death penalty to child rape is not.

At the same time, while public opinion debated the merits of complete abolition of the death penalty, Parliament moved to limit the categories of murder for which the death penalty should apply. In 1949, the Royal Commission on Capital Punishment was established to consider the use of the death penalty in the United Kingdom. By 1953, when the Commission reported its findings, there was a growing consensus that, even if the death penalty should not be abolished, its use should be restricted to the most serious acts of murder.[15]

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[15] THE REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1953, [Cmd.] 8932, at 20. Although the government at the time failed to pursue all of the Commission's proposals, the UK Parliament did adopt the Homicide Act 1957, which distinguished between capital and non-capital murder and narrowed the categories of murder for which the death penalty

Since 1964 (one year before Parliament abolished the death penalty for murder),[16] no person has been executed for any offense in the United Kingdom. The death penalty remained on the statute book for certain offenses against the state (arson in a royal dockyard until 1971,[17] espionage until 1981,[18] and piracy and high treason until 1998[19]), although the last execution for any of these offenses took place in 1946. On October 10, 2003, the U.K. ratified the Thirteenth Protocol to the European Convention on Human Rights,[20] which prohibits the use of the death

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could be imposed. Only the following categories of murder were considered serious enough to carry the death penalty: (i) any murder done in the course of or furtherance of theft; (ii) any murder by shooting or by causing an explosion; (iii) any murder done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody; (iv) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting; (v) in the case of a person who was a prisoner at the time when he did or was party to the murder, any murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting; and (vi) two or more murders on different occasions. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, §§ 5–6 (Eng.).

[16] Murder (Abolition of Death Penalty) Act, 1965, c. 71, § 1(1) (Eng.).

[17] Criminal Damage Act, 1971, c. 48, § 4(1)–(2) (Eng.).

[18] Armed Forces Act, 1981, c. 55 § 17 (Eng.).

[19] Crime and Disorder Act, 1998, c. 37, § 36(4)–(5) (Eng.).

penalty in all circumstances, and the U.K. became an abolitionist state in law as well as practice.[21]

C. Today, the United Kingdom Recognizes the Unique Seriousness of Murder Compared with All Other Offenses Against the Person, and This is Reflected in its Sentencing Policy

When sentencing, English courts must consider the following statutory purposes: (i) the punishment of offenders; (ii) deterrence and the reduction of crime; (iii) reform and rehabilitation of the offender; (iv) the protection of the public; and (v) the making of reparation to the victims.[22] Courts must determine the seriousness of the offense and, in doing so, must consider the offender's culpability in committing the offense and any harm which the offense caused, was

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[20] Protocol Thirteen to the European Convention on Human Rights, Feb. 1, 2004.

[21] Protocol Thirteen has now been ratified by 40 European states and signed by five others. It superseded Protocol Six, which abolished the death penalty for most purposes but permitted states to make provision for the death penalty in respect of acts committed in time of war, or under imminent threat of war. *See*, Hansard Publications and Records, Human Rights Act 1998 (Amendment) Order 2004, Column 1420 per Lord Evans of Temple Guiting (May 26, 2004).

[22] Criminal Justice Act, 2003, c. 44, § 142(1) (Eng.). These statutory purposes do not apply to murder which is a sentence "fixed by law." *Id.* § 142(2)(b).

intended to cause or might foreseeably have caused.[23]

Current sentencing policy in the United Kingdom reflects the unique seriousness of murder as compared to any other offense against the person. Murder alone in the United Kingdom carries a mandatory sentence of life imprisonment. Murder (Abolition of Death Penalty) Act, 1965, c. 71, § 1(1) (Eng.). Sentencing guidelines published in April 2007 set out proposed sentences for sexual offenses that are intended to achieve and reflect the statutory purposes set out above. Sexual Offences Act 2003, Guidelines by the Sentencing Guidelines Council, Definitive Guideline (April 2007). The guidelines state that the recommended sentence for an offender who commits the single offense of rape of a child under 13 where there are no aggravating factors is 10 years' imprisonment. *Id.* at 25. This rises to 13 years for cases involving any aggravating factors such as breach of trust, more than one offender acting together, abduction or detention or sustained attack. *Id.* A discretionary maximum sentence of imprisonment for life may also be imposed.[24]

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[23] *Id.* § 143(1).

[24] *Id.* Such a sentence is the starting point for offenders where the court considers that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified serious offenses. Criminal Justice Act, 2003, c. 44, § 225(1) (Eng.).

The sentencing guidelines emphasize that for this type of offense, more than for many others, the sentencing process must allow for flexibility and variability. *Id.* at 5, ¶ 1.3. There are also issues regarding the deterrence goal when setting the sentencing tariff for these offenses. In rape or child rape cases, where the perpetrator is often a relative or acquaintance of the victim, fear that a too severe penalty will be imposed might inhibit the victim, or another family member, from reporting the offense. Failing to distinguish between the sentences for rape and murder would also remove a major incentive for a rapist not to kill his victim in order to eliminate the only witness to his crime.

II. There is a Well-Established Global Consensus that Nations That Retain the Death Penalty Must Strictly Limit Its Application

The United Kingdom's experience is consistent with well-established international norms regarding the application of the death penalty. International authorities have long agreed that nations that retain the death penalty must refrain from expanding the death penalty to crimes to which it currently does not apply – a principle that has been codified in a regional convention and reaffirmed by the jurisprudence of human rights bodies. There is an equally strong global consensus that nations should gradually narrow the categories of offenses for which the death penalty may be imposed. Evidence of this consensus is found in the

resolutions and statements of United Nations organs, in the jurisprudence of international human rights bodies, and in the commentary of recognized experts in the field of international law. It finds further confirmation in the statements and practices of retentionist nations, where the use of the death penalty has been progressively restrained.

All nations should respect the principles embodied in these sources of international law, not only because they express a standard of decency setting the outer boundary for civilized punishment among the community of nations, but also because they enable nations observing that boundary to affirm the dignity and assure the protection of victims of reprehensible crimes—like child rape—by insisting that severe condemnation and punishment of such crimes can be accomplished by penalties less than death.

A. Nations That Retain the Death Penalty May Not Extend the Death Penalty to Crimes to Which It Does Not Presently Apply

The U.N. Commission on Human Rights[25] has

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[25] The U.N. Commission on Human Rights, an ECOSOC-created organ, was given the broad mandate of promoting human rights worldwide. *See* THOMAS BUERGENTHAL, DINAH SHELTON & DAVID STEWART, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 96 (West 3rd ed. 2002). It was superceded by the Human Rights Council in 2006. G.A. Res. 60/251, § 1, U.N. Doc. A/RES/60/251 (Apr. 3,

repeatedly called on nations maintaining the death penalty "not to extend [the death penalty's] application to crimes to which it does not at present apply."[26] In the Americas, this principle has been codified in Article 4(2) of the American Convention on Human Rights (ACHR).[27] The two human rights bodies that monitor compliance with human rights in the region—the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights—have both emphasized the fundamental nature of this principle in assessing the application of the death penalty in the Americas.

2006).

[26] U.N. Comm. on Hum. Rts., *The Question of the Death Penalty*, Res. 2005/59, ¶5(b), U.N. Doc. 2005/59 (Apr. 20, 2005); U.N. Comm. on Hum. Rts., *The Question of the Death Penalty*, Res. 2004/67, ¶ 5(b), U.N. Doc. 2004/67 (Apr. 21, 2004); U.N. Comm. on Hum. Rts., *The Question of the Death Penalty*, Res. 2003/67, ¶ 5(a), U.N. Doc. 2003/67 (Apr. 24, 2003).

[27] American Convention on Human Rights [ACHR] art. 4(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("the application of [the death penalty] shall not be extended to crimes to which it does not presently apply"); *see also* Protocol to the ACHR to Abolish the Death Penalty, ¶ 1, O.A.S.T.S. No. 73, U.N.T.S. A-53 ("Article 4 of the American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty.").

The United States has signed the American Convention, and is therefore obligated not to defeat its object or purpose. Vienna Convention on the Law of Treaties art. 18, Jan. 27, 1980, 1155 U.N.T.S. 331.

In an advisory opinion interpreting Article 4(2), the Inter-American Court on Human Rights concluded:

> Although in the one case the Convention does not abolish the death penalty, it does forbid extending its application and imposition to crimes for which it did not previously apply. In this manner any expansion of the list of offenses subject to the death penalty has been prevented. In the second case, the reestablishment of the death penalty for any type of offense whatsoever is absolutely prohibited[.][28]

In *Raxcacó-Reyes v. Guatemala,* the Inter-American Court concluded that Guatemala had violated Article 4(2) by sentencing an offender to death for abducting an eight-year-old child—a crime that did not carry a death sentence at the time Guatemala ratified the American Convention on Human Rights. *Raxcacó-Reyes v. Guatemala,* 2005 Inter-Am. Ct. H.R. (ser. C) No. 133, ¶ 56 (Sept. 15, 2005). The Court concluded that a kidnapping which did not result in death was not a "most serious crime" under Article 4(2) of the American Convention. *Id.* ¶ 71; *see also id.* ¶ 28 (separate opinion of Judge Garcia-Ramirez)

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[28] *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights), OC-3/83 Op. Inter-Am. 15, ¶ 56 (September 8, 1983) (advisory opinion).

(concluding that the only offense that constitutes a "most serious crime" is aggravated homicide).[29]

The Inter-American Commission on Human Rights has held that the principle set forth in Article 4(2) reflects established international norms. In 2000, the Inter-American Commission concluded that the reinstatement and expansion of the federal death penalty in the United States was "inconsistent with the spirit and purpose of numerous international human rights instruments to which the State is a signatory or a party, and [was] at odds with a demonstrable international trend toward more restrictive application of the death penalty." *Garza v. United States*, Case 12.243, Inter-Am. C.H.R., Report No. 52/01, OEA/Ser.L/V/II/111, doc. 20, rev. ¶ 94 (2000).

B. Nations That Retain the Death Penalty Must Progressively Narrow the Class of Offenses Punishable by Death

On December 18, 2007, the United Nations General Assembly adopted a resolution calling upon

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[29] In response to the ruling, Guatemala commuted the offender's death sentence to a term of forty years. Inés Benítez, *Guatemala Complies with Inter-American Court Ruling*, INTER-PRESS SERVICE NEWS AGENCY, Oct. 19, 2007, at 1, *available at* http://ipsnews.net/news.asp?idnews=39737 (last visited Feb. 15, 2008).

"all States that still maintain the death penalty to . . . progressively restrict the use of the death penalty and reduce the number of offenses for which it may be imposed[.]" G.A. Res. GA/10678, § 2(c), U.N. Doc. A/C.3/62/L.29 (Dec. 18, 2007). The General Assembly further called upon nations that had abolished the death penalty not to reintroduce it. *Id.* at § 3. The text of the resolution, which was adopted by a wide majority of nations, is only the most recent demonstration of the international community's longstanding consensus on these points.

Past U.N. Resolutions and other U.N. Reports express a consistent view; indeed, the language in many of these documents is synonymous with the language of the 2007 resolution. For example, in 1971 and in 1977 the General Assembly passed resolutions calling for progressive restrictions on the number of offenses for which capital punishment may be imposed.[30] Over the last three decades, the United Nations Economic and Social Council (ECOSOC)[31] has likewise passed numerous resolutions reiterating this principle.[32] And the U.N. Commission on Human

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[30] G.A. Res. 2857 (XXVI), ¶ 3, U.N. Doc. A/2027 (Dec. 20, 1971); G.A. Res. 32/61, ¶ 1, U.N. Doc. A/RES/32/61 (Dec. 9, 1977).

[31] ECOSOC is a charter body of the United Nations empowered to adopt resolutions for the promotion of human rights around the world. *See* U.N. Charter art. 68.

[32] U.N. ESCOR Res. 1996/15, ¶ 1, U.N. Doc. E/1996/96 (July 23, 1996) (noting that an increasing number of nations have "adopted

Rights adopted a resolution each year between 1997 and 2005 calling on nations maintaining the death penalty to progressively restrict the number of offenses punishable by death.[33]

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a policy of reducing the number of capital offenses"); U.N. ESCOR Res. 1995/57, ¶ 2, U.N. Doc. E/1995/95 (July 28, 1995) (same); U.N. ESCOR Res. 1990/90, ¶ 2, U.N. Doc. E/1990/51/Add.1 (July 24, 1990) (same); U.N. ESCOR Res. 1989/64, ¶ 5, U.N. Doc. E/Res/1989/89 (May 24, 1989) ("[N]oting with satisfaction that a large number of Member States have [begun implementing] safeguards."); U.N. ESCOR Res. 1930 (LVIII), ¶ (b), U.N. ESCOR, Organizational Session for 1975, Supp. No. 1, U.N. Doc A/Res/1930 (May 6, 1975) (noting that the number of death-eligible offenses between 1969 and 1973 "has been progressively declining in many parts of the world"); U.N. ESCOR Res. 1745 (LIV), ¶¶ 1, 3, U.N. ESCOR 54th Sess., Supp. No. 1, U.N. Doc. A/Res/1745 (May 16, 1973).

[33] *See* U.N. Comm. on Hum. Rts., *The Question of the Death Penalty*, Res. 2005/59, ¶ 5(b), U.N. Doc. 2005/59 (Apr. 20, 2005); U.N. Comm. on Hum. Rts., *The Question of the Death Penalty*, Res. 2004/67, ¶ 5(b), U.N. Doc. 2004/67 (Apr. 21, 2004); U.N. Comm. on Hum. Rts., *The Question of the Death Penalty*, Res. 2003/67, ¶ 5(a), U.N. Doc. 2003/67 (Apr. 24, 2003); U.N. Comm. on Hum. Rts., *The Question of the Death Penalty*, Res. 2002/77, ¶ 5(a), U.N. Doc. 2002/77 (Apr. 25, 2002); U.N. Comm. on Hum. Rts., *The Question of the Death Penalty*, Res. 2001/68, ¶ 5(a), U.N. Doc. 2001/68 (Apr. 25, 2001); U.N. Comm. on Hum. Rts., *The Question of the Death Penalty*, Res. 2000/65, ¶ 4(b), U.N. Doc. 2000/65 (Apr. 26, 2000); U.N. Comm. on Hum. Rts., *The Question of the Death Penalty*, Res. 1999/61, ¶ 4(b), U.N. Doc. 1999/61 (Apr. 28, 1999); U.N. Comm. on Hum. Rts., *The Question of the Death Penalty*, Res. 1998/8, ¶ 4(a), U.N. Doc. 1998/8 (Apr. 3, 1998); U.N. Comm. on Hum. Rts., *The Question of the Death Penalty*, Res. 1997/12, ¶ 4, U.N. Doc. U.N. Doc. 1997/12, (Apr. 3, 1997).

Echoing the calls of the U.N. organs, the Human Rights Committee[34] and U.N. Special Rapporteurs[35] have repeatedly observed that states must restrain their use of the death penalty, both by limiting the death penalty to the most serious crimes and by narrowing the scope of death eligible offenses.[36] This

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[34] The Human Rights Committee is charged with monitoring compliance with the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights [ICCPR] art. 28, Mar. 23, 1976, 999 U.N.T.S. 171.

[35] The United Nations Commission on Human Rights formerly appointed experts to serve as Special Rapporteurs on thematic issues as well as to gather information regarding human rights practices in specific countries. U.N. Comm. on Hum. Rts., *Extrajudicial, Summary or Arbitrary Executions*, Res. 1996/74, § 7, U.N. Doc. 1996/74 (Apr. 23, 1996). The Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions are currently appointed by the Human Rights Council. G.A. Res. 60/251, § 5, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

[36] *See, e.g.*, Human Rights Comm., General Comment No. 06: *The Right to Life*, 16th Sess., §6, U.N. Doc. 30/04/82 (1982) ("[w]hile... States Parties are not obliged to abolish the death penalty totally they are obliged to limit its use"); U.N. Hum. Rts. Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 65, U.N. Doc. A/HRC/4/20/2007/18 (Jan. 29, 2007); U.N. Comm. on Hum. Rts., *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 147, U.N. Doc. A/HRC/4/33/Add.2 (Mar. 15, 2006); Press Release, U.N. Comm. on Hum. Rts., Special Rapporteur on Torture Highlights Challenges at End of Visit to China 9, *available at*

mandate clearly extends to the United States, which is a party to the International Covenant on Civil and Political Rights (ICCPR). International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171. In 2006, in response to information regarding the expansion of the death penalty in the United States, the Human Rights Committee called upon the United States to "review federal and state legislation with a view to restricting the number of offenses carrying the death penalty." Human Rights Comm., *Concluding Observations of the Human Rights Committee, United States of America*, ¶ 29, U.N. Doc. A/61/40 (July 2006).

Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR) provides, "[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes." ICCPR art. 6. The Human Rights Committee has concluded that only crimes that result in the loss of life constitute "most serious crimes" under Article 6. Human Rights Comm., *Concluding Observations of the Human Rights Committee, Islamic Republic of Iran*, ¶ 8, U.N. Doc. CCPR/C/79/Add.25 (1993). The Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions concurs with this

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http://www.unhchr.ch/huricane/huricane.nsf/0/677C1943 FAA14D67C12570CB0034966D?opendocument (Dec. 2, 2005); U.N. Comm. on Hum. Rts., *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 55, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004); U.N. Comm. on Hum. Rts., *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 47, U.N. Doc. E/CN.4/2004/7 (Dec. 22, 2003).

judgment. In a recent report analyzing the *travaux preparatoires* of the ICCPR and the jurisprudence of all of the principal United Nations bodies charged with interpreting Article 6, he concludes, "the death penalty can only be imposed in cases where it can be shown that there was an intention to kill which resulted in the loss of life."[37]

Finally, the practices of retentionist states reflect and reaffirm the international legal principle that the scope of the death penalty should be progressively limited. The U.N. Secretary General's 2005 *Report on Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* recognizes "an encouraging trend toward . . . restriction of the use of capital punishment in most countries."[38] This trend had earlier been documented

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[37] Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 65, U.N. Doc. A/HRC/4/20/2007/18 (Jan. 29, 2007). *See also* Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 21, U.N. Doc. E/CN.4/1998/68/Add.3 (Jan. 22, 1998) ("the most serious crimes are those 'intentional crimes with lethal or other extremely grave consequences.' The Special Rapporteur considers that the term 'intentional' should be equated to premeditation and should be understood as deliberate intention to kill.").

[38] The Secretary-General, *Report of the Secretary-General on Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ¶ 3, U.N. Doc. E/2005/3 (Mar. 9, 2005).

by the U.N. Sub-Commission on the Promotion and Protection of Human Rights. In reports issued in 1999 and 2000, the Sub-Commission noted compelling empirical evidence that demonstrated the "tendency in retentionist States to restrict the number of crimes carrying a possible death sentence."[39]

The observations of these U.N. bodies are consistent with both historical and current practices of retentionist states. In Japan, for example, the government has gradually narrowed the categories of offenses that are death-eligible over the last 150 years. Japan abolished the death penalty for rape in 1908. *See* PETRA SCHMIDT, CAPITAL PUNISHMENT IN JAPAN 19–21, 25–28 (2002). Japan's penal code currently authorizes the death penalty for seventeen crimes, most of which are various forms of homicide and treason. *See id.* at 30. Although the penal code does permit the imposition of the death penalty for certain non-homicide offenses, since 1945 the death penalty has been reserved primarily for cases of murder and robbery-murder. *Id.* at 39, 46–47. The most comprehensive scholarly treatment of the death penalty in Japan indicates that no death sentences for rape have been handed down for at least the last 100

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[39] U.N. Sub-Comm. on the Promotion and Protection of Human Rights, ¶ 4, Res. 2000/17, U.N. Doc. 2000/17, (Aug. 17, 2000); *see also* U.N. Sub-Comm. on the Promotion and Protection of Human Rights, ¶5, Res. 1999/4, U.N. Doc. 1999/4, (Aug. 24, 1999).

years. *Id.* at 27–47.[40]

As this overview of international law and state practice demonstrates, there are certain well-established principles that should inform the Court's analysis of the case at bar. Louisiana has extended the application of the death penalty to the crime of child rape – a crime to which it did not previously apply. This expansion of the death penalty contravenes international norms, which not only prohibit the expansion of the death penalty but also call for a progressive narrowing of its scope. *Amici* respectfully urge the Court to consider these principles in evaluating the constitutionality of Patrick Kennedy's death sentence under the Eighth Amendment to the United States Constitution.

III. Current State Practice Reflects a Global Consensus that the Death Penalty is an Excessive Punishment for Rape.

The death penalty is authorized by law for the crime of rape or child rape in only twenty-eight of the world's 193 nations.[41] No Western democracy continues

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[40] Even China, the nation responsible for the vast majority of the world's executions, has indicated it intends to reduce the number of offenses that are death-eligible. *China Questions Death Penalty*, CHINA DAILY, Jan. 27, 2005, http://www.chinadaily.com.cn/english/doc/2005-01/27/content_412758.htm.

[41] The 193 nations are those members of the United Nations and

to authorize the punishment. And of the twenty-eight nations that authorize the practice by law, six are considered to be abolitionist in practice as they have not carried out any executions in at least ten years.[42]

None of the twenty-two retentionist states that

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the Holy See. The death penalty for rape is available in Bangladesh, China, Cuba, Democratic Republic of the Congo, Egypt, Iran, Iraq, Jordan, Kuwait, Laos, Lesotho, Malawi, Mauritania, Mongolia, Nigeria, Pakistan, Qatar, Saudi Arabia, Somalia, South Korea, Syria, Tajikistan, Thailand, Tunisia, Uganda, United Arab Emirates, Vietnam, and Yemen. Data is not available for Libya.

Hands Off Cain has reported that Malaysia authorizes the death penalty for rape. Hands Off Cain, Hands Off Cain Database,http://www.handsoffcain.info/bancadati/schedastato.php ?idstato=10000008&idcontinente=23 (explaining that rape is punishable by death in Malaysia). This is incorrect. The penal code of Malaysia establishes that the crime of rape is punished by a term of incarceration and not the death penalty. Malaysia Penal Code, ¶ 376 (setting punishment at term of incarceration for rape).

[42] Those nations are: Laos, Lesotho, Malawi, Mauritania, South Korea, and Tunisia. *See* Amnesty International, Death Penalty: Countries Abolitionist in Practice (Sept. 19, 2007), *available at* http://www.amnesty.org/en/death-penalty/countries-abolitionist-in-practice. In addition, Tajikistan's legislature passed a moratorium bill in 2004, and no executions have been carried out since that time. *See* Eurasianet.org, Tajikistan: Parliament Follows Regional Trend by Adopting Moratorium on Death Penalty, June 5, 2004, http://www.eurasianet.org/departments/rights/articles/pp060504.shtml.

authorize the death penalty for rape could be considered nations that share the "Anglo-American heritage" of the United States. *See Thompson*, 487 U.S. 830 & n.31. Many are nations whose legal traditions are influenced by Islamic law, which often calls for greater penalties than those typically inflicted for similar crimes in Western nations.[43] None of the twenty-two nations, with the exception of Mongolia, is an electoral democracy.[44]

Amici have found no evidence of an international trend to expand the death penalty to the crime of child rape. Indeed, the trend is in the opposite direction. In 2002, it was reported that Belarus,

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[43] In Nigeria, for example, the penal code developed by the national government does not authorize the death penalty for rape. *See* Nigeria Criminal Code Act, pt. V, ¶ 358 ("Any person who commits the offence of rape is liable to imprisonment for life, with or without caning."). The Shari'ah code that is applied in Zamfara state, by contrast, authorizes the death penalty for rape, Zamfara State of Nigeria, Shari'ah Penal Code Law, ch. VIII, ¶ 127 available at http://www.zamfaraonline.com/sharia/chapter08.html ("Whoever commits the offense of [having sexual intercourse through the genitals of a person over whom he has no sexual rights] shall be punished . . . if married, with stoning to death (*rajm*)."), adultery, *id.* ¶ 128, and sodomy, *id.* ¶ 129. "Lesbianism" is punished by fifty lashes and imprisonment up to six months. *Id.* ¶ 135. Theft is punished by amputation of the right hand. *Id.* ¶ 145.

[44] FREEDOM HOUSE, FREEDOM IN THE WORLD 2008, *available at* http://www.freedomhouse.org/uploads/fiw08launch/FIW08Tables.pdf. (last visited Feb. 18, 2008).

Kazakhstan, Kyrgyzstan, Morocco, Uzbekistan and the Philippines authorized the imposition of the death penalty for some form of rape. ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 83 (2002). Since then, these countries have either abolished the death penalty entirely (Kyrgyzstan, Philippines, Uzbekistan),[45] or have eliminated the death penalty for rape (Belarus, Kazakhstan, Morocco).[46] There are few reports of executions for any form of rape not resulting in death. A search of a leading database on the death penalty reveals that the only countries reported to have imposed death sentences for the crime of rape in recent years are Saudi Arabia, Iran, China and Kuwait. Hands Off Cain, Hands Off Cain Database, http://www.handsoffcain.info/search/? srctxt=rape (last visited Feb. 18, 2008).

The nations with which the United States shares a common legal tradition long ago determined that the death penalty was an excessive punishment for the crime of rape, including child rape. Eighty-five percent of the world's nations agree.

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[45] *See* Amnesty International, *supra* note 42.

[46] *See* OSCE Office for Democratic Institutions and Human Rights, Legislation Online: Belarus, http://www.legislationline.org/?jid=7&less= false&tid=144; OSCE Office for Democratic Institutions and Human Rights, Legislation Online: Kazakhstan, http://www.legislationline.org/?tid= 144&jid=28&less=false; Morocco Penal Code, arts. 486–88 (establishing that various terms of imprisonment are imposed for categories of rapes).

CONCLUSION

Louisiana's expansion of the death penalty to the crime of child rape is inconsistent with the history of the death penalty's application in the United Kingdom and violates established principles of international law. The vast majority of the world's nations have concluded that the death penalty is an excessive punishment for any form of rape that does not result in death. It would be a great disservice to the world community if the United States, long a leader in promoting and advocating human rights, permitted its local governments to expand the death penalty to the crime of child rape.

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APPENDIX

APPENDIX

List of *Amici Curiae*

The **Bar Human Rights Committee** (BHRC) is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world and with defending the rule of law and internationally recognized legal standards relating to the right to a fair trial. The BHRC has previously acted as an amicus to the US Supreme Court in the case of *Roper v. Simmons*.

The **International Human Rights Committee** is the human rights arm of the **Law Society**, which is the representative body for solicitors in England and Wales. Its stated purpose is to uphold human rights and the rule of law around the world, particularly in relation to lawyers, their professional activities and the upholding of international human rights standards.

The **British Institute of International and Comparative Law** continues a mission first begun in 1895: to advance the understanding of international and comparative law; to promote the rule of law in international affairs; and to promote their application through research, publications and events.

The Lords of Appeal in Ordinary (or 'Law Lords') are the most senior judges in the United Kingdom. They are appointed to the appellate committee of the House of Lords, which acts as the highest court for U.K. domestic matters and hears appeals from lower courts on important or complex matters of law. The following former law lords are *amici* in this case:

Lord Browne-Wilkinson of Camden M.C
Lord Griffiths of Govilon M.C
Lord Millett of Marylebone
Lord Steyn of Swafield

In the United Kingdom, the rank of **Queen's Counsel** is a mark of distinction as an advocate. Only those practitioners who are considered to be the leaders of the profession in terms of ability and integrity are appointed to the role. The following Queen's Counsel are *amici* in this case:

Sir Sydney Kentridge QC
Lord Lester of Herne Hill QC
Conrad Dehn QC
Sir David Edward QC
Ian Brownlie CBE QC, UK Chairman of the International Law Commission
Gordon Pollock QC
Ian Hunter QC
Lord Grabiner of Alwych QC
The Hon. Michael J. Beloff QC
Stewart Boyd QC
David Donaldson QC
Nicholas Strauss QC
Robert Englehart QC

V.V.Veeder QC
Ian Glick QC
Barbara Dohmann QC
Hilary Heilbron QC
Bernard Eder QC
Alan Boyle QC
Jonathan Harvie QC
Professor Jeffery Jowell QC
Stephen Nathan QC
Patrick O'Connor QC
Presiley Baxendale QC
Professor Anthony Dicks QC
Richard Gordon QC
Christopher Sallon QC
Thomas Sharpe QC
Cherie Booth QC
Mark Hapgood QC
Christopher Gibson QC
Andrew Nicol QC
Clare Montgomery QC
Dr. David Thomas QC
Mark Howard QC
Andrew Hochhauser QC
Jeffrey Gruder QC
Andrew Popplewell QC
George Leggatt QC
Nicholas Green QC
Michael Grieve QC
Thomas Ivory QC
Richard Jacobs QC
Timothy Dutton QC
William Wood QC
Charles Hollander QC
Jeffery Onions QC
Stephen Auld QC

Rhodri Davies QC
Ian Mill QC
David Anderson QC
Aidan O'Neill QC
David Mildon QC
Gavin Millar QC
Tim Owen QC
Geraldine Andrews QC
Antony White QC
Raymond Cox QC
Victor Lyon QC
Richard Lord QC
Michael McLaren QC
Kenneth MacLean QC
Hugh Tomlinson QC
Mark Brealey QC
Keir Starmer QC
Malcolm Gammie QC
Andrew Lydiard QC
Conor Quigley QC
Laurence Rabinowitz QC
Andrew Hall QC
Professor Malcolm Shaw QC
Rabinder Singh QC
Mark Templeman QC
Richard Millett QC
Charles Graham QC
Joe Smouha QC
Bankim Thanki QC
Hugo Page QC
Robert Anderson QC
Simon Bryan QC
Anthony de Garr Robinson QC
Michael Fordham QC
David Foxton QC

Tom Linden QC
Robin Oppenheim QC
Craig Orr QC
Tim Otty QC
David Perry QC
Mark Milliken-Smith QC
Khawar Qureshi QC
Patricia Robertson QC
Dinah Rose QC
Heather Williams QC
Huw Davies QC

Professor Robert McCorquodale is the head of the School of Law at the University of Nottingham and the incoming director of the British Institute of International and Comparative Law.

Professor Roger Hood is the Director of the Centre for Criminological Research and a Fellow of All Souls College, Oxford.

AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

PATRICK KENNEDY,
Petitioner,

versus

LOUISIANA,
Respondent.

On Writ of Certiorari
To the Louisiana Supreme Court

BRIEF OF *AMICI CURIAE* THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE LOUISIANA PUBLIC DEFENDERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Louisiana Association of Criminal Defense Lawyers (LACDL) and the Louisiana Public Defenders Association (LaPDA) are voluntary professional organizations of private and public defense attorneys practicing in the state of Louisiana.[1] LACDL and LaPDA count among its members the vast majority of the criminal defense bar in Louisiana. LACDL and LaPDA's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated.

The case before the Court raises critically important issues that implicate basic trial rights, including the right to counsel. Members of *amici curiae* represent clients whose interests are gravely affected by these issues.

SUMMARY OF ARGUMENT

The members of *amici curiae* represent indigent persons in Louisiana who are charged with capital offenses. Currently there are at least 70 pending aggravated child (capital) rape indictments in

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. The parties have filed letters giving their blanket consent to the filing of *amicus* briefs in this case.

Louisiana.[2] Because a sentence of death is "qualitatively different from a sentence of imprisonment, however long," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), "[e]very task ordinarily performed in the representation of a criminal defendant is more difficult and time–consuming when the defendant is facing execution." Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L.Rev. 329, 357 (1995).

Louisiana's indigent defense system is over–burdened and under–funded and there are simply not enough resources to defend this class of capital defendants. If the capital provisions of La. Rev. Stat. § 14:42 are upheld, Louisiana's already crippled indigent defense system will suffer severely. The continued additional burden of capital rape cases will undermine constitutionally adequate representation in all other indigent criminal cases inasmuch as the system is already strained to the limit.

ARGUMENT

This Court declared in *Gideon v. Wainwright* that "lawyers in criminal courts are necessities, not luxuries." 372 U.S. 335, 344 (1963). Despite Louisiana's attempts to provide indigent defense

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[2] Unfortunately, no office, entity, or organization within the State of Louisiana maintains a current list of open capital indictments. With the assistance and dedication of volunteer students, *amici* have been able to confirm that currently there are *at least* 70 open capital child rape indictments. The true number of pending capital rape indictments, however, is surely much higher than 70—most likely well over 100. *See* n. 12, *infra*.

services, thirty years after *Gideon* there was still a "general pattern . . . of chronic underfunding of indigent defense programs in most areas of the state." *State v. Peart*, 621 So.2d 780, 789 (La. 1993). As recently as three years ago, the Louisiana Supreme Court again visited the failures of the state to properly fund indigent defense, holding that the trial court may halt the prosecution of capital cases where, as there, there was a lack of adequate funds "to provide for . . . defendants' constitutionally protected right to counsel." *State v. Citizen*, 04-KA-1841 (La. 04/01/2005), 898 So.2d 325, 339.

I. Because "Death Is Different," Capital Defense Representation Is Uniquely Demanding.

This Court has consistently held that death is different: "[t]he taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurter, J., concurring). *See also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.").

Capital defense representation is complex and specialized. *See, e.g., McFarland v. Scott*, 512 U.S. 849, 855 (1994) (noting the uniqueness and complexity of death penalty jurisprudence). The responsibilities of capital defense counsel "are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master." *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death*

Penalty Cases (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 923 (2003) (*ABA Guidelines*).

This qualitative difference in capital cases has spawned the creation of national guidelines for the performance of defense counsel in capital cases by the American Bar Association. These Guidelines have been approvingly cited by this Court as minimum professional standards. *See, e.g., Strickland v. Washington,* 466 U.S. 668, 688 (1984); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387, n. 7 (2005).

In 1994, Louisiana adopted standards similar to the *ABA Guidelines* for the representation of indigent defendants charged with capital offenses. *Louisiana Supreme Court*, Rule XXXI.[3] Pursuant to Rule XXXI, the Louisiana Public Defender Board[4] also promulgated Standards Relating to the Provision of Counsel to Indigents Accused of Capital Crimes (*LPDB Standards*)[5].

The *ABA Guidelines* and *LPDB Standards* establish national and state standards of practice "to ensure high quality legal representation for all persons" facing a potential death sentence. *ABA Guidelines*, Guideline 1.1(A). Because of the pressure–filled, high–stakes, complex litigation involved in capital defense, these national and state

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[3] Rule XXXI provides, *inter alia*, for the appointment of "no less than two attorneys to represent the defendant" in all capital cases where the defendant is found to be indigent.

[4] Rule XXXI created the Louisiana Indigent Defender Board in 1994. That board was later renamed the Louisiana Indigent Defense Assistance Board, and again renamed in 2007 to the Louisiana Public Defender Board.

[5] Located at http://www.lidab.com/standards.htm (last visited Feb. 12, 2007).

standards demand that the quality of counsel's "guiding hand" ensure a reliable determination of guilt and of the appropriate sentence. The purpose of *Amici*'s brief is not to detail the ABA and LPDB's standards, but rather to impress upon the Court the complex, intense, and rigorous litigation surrounding capital defense.

II. Louisiana's Indigent Defense System Suffers From Being Under–Funded and Over–Burdened.

The indigent defense system in Louisiana has long been crippled with over–burdened and under–resourced public defenders. *See, e.g., State v. Peart*, 621 So.2d at 790 ("[W]e find that because of the excessive caseloads and the insufficient support with which their attorneys must work, indigent defendants in [Orleans Criminal District Court] are generally not provided with the effective assistance of counsel the constitution requires."); *State v. Citizen*, 898 So.2d at 336 (noting the need for "sweeping reform of the system and . . . adequate funding for indigent defense" in Louisiana).

Studies of various rural and urban jurisdictions across the state have revealed that "Louisiana fails to meet its federal obligations under *Gideon*." National Legal Aid & Defender Association (NLADA), *In Defense of Public Access to Justice* (March 2004).[6] Indeed, the Louisiana Senate

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[6] In noting the importance of indigent defense, one federal judge stated, "As one maritime lawyer commented to me, even a cargo claim over soggy bags of coffee beans gets a better defense than a person capitally charged in Louisiana. . . ." Judge Helen "Ginger" Berrigan, United States District Court, Eastern District of Louisiana, Oct. 31, 2003. For full text of speech, *see*

unanimously passed a Concurrent Resolution in 2006 calling for "the Congress of the United States to take such actions as are necessary to providing funding for Louisiana's indigent defense system . . . ."[7]

The primary causes of the state's failing indigent defense system are inadequate funding and crushing caseloads of public defenders. As one report put it: "The indigent defense system in Louisiana is beyond the point of crisis and is so weakened in relation to the other criminal justice system components that it calls into question the ability of the entire criminal court system to dispense justice accurately and fairly." NLADA, *In Defense of Public Access to Justice.*[8]

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www.criminaljustice.org/public.nsf/newsreleases/2003mn032?opendocument (last visited Feb. 11, 2008).

[7] S. Con. Res. 25, 2006 Leg., 1st Ex. Sess. (La. 2006).

[8] *See also,* Michael M. Kurth and Daryl V. Burckel, *Defending the Indigent in Southwest Louisiana,* (July 2004) (the Calcasieu Parish Public Defender Office "is obviously over–burdened" with "more than 3 times the [LPDB] standard and more than 4 times the national standard."); Bernadette Jones Palombo & Jeff Shadow,*The Provision of the Right to Counsel in Caddo Parish, Louisiana* (July 2004) ("Inadequate and imbalanced funding forces public defenders to carry caseloads far in excess of the standards set by the [LPDB]. . . . The inadequate staffing precludes public defense attorneys from . . . providing effective representation."); Stacey Moak, *Indigent Defense in Northeast Louisiana* (Dec. 2004) (noting the need for funding for and accountability by public defenders in the northeast judicial districts of the state); Brennan Center for Justice, *The Case for Community Defense in New Orleans* (May 2006) ("New Orleans's system of public defense is broken. This much has been known for a long time."); NLADA, *A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana's Criminal Courts* (Sept. 2006) ("The current Orleans Parish indigent defense crisis is inextricably linked to the right to

Members of the defense bar are obligated—professionally and ethically—to avoid excessive caseloads. *See* ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441 (May 13, 2006) (noting attorneys' ethical obligation to control their workload).[9] The LPDB recommends that capital defense counsel handle no more than 3–5 capital cases simultaneously.[10] The addition of another class of persons to the group of

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counsel struggles of . . . Avoyelles, East Baton Rouge, Caddo or Calcasieu Parish.")

[9] Found at http://www.abanet.org/cpr/06_441.pdf (last visited Feb. 12, 2008). *See also ABA Guidelines*, commentary to Guideline 6.1 ("In order to achieve the goal of providing capital defendants with high quality legal representation, the caseloads of their attorneys must be such as to permit the investment of the extraordinary time and effort necessary to ensure effective and zealous representation in a capital case."); *ABA Ten Principles of a Public Defense Delivery System* (Feb. 2002), Principle 5 ("National caseload standards should in no event be exceeded") and n. 19 ("The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea."); NLADA, *American Council of Chief Defenders Statement on Caseloads and Workloads* (Aug. 2007) ("Capital defense can require thousands of attorney hours. . . . The workload of attorneys representing defendants in death penalty cases must be maintained at levels that enable counsel to provide high quality representation in accordance with existing law and evolving legal standards.").

[10] LPDB Louisiana Standards on Indigent Defense, Standard 12-2.1, found at www.lidab.com/Acrobat%20files/Chapter%2012.PDF (last visited Feb. 12, 2008). The ABA does not set a specific number for capital caseload standards, but notes that "[t]he workload demands of capital cases are unique . . ." *ABA Ten Principles of a Public Defense Delivery System*, n. 9, *supra*.

offenses that are subject to the death penalty has only increased the ethical, professional, and financial strains on what is a fast collapsing public defense system.

III. Allowing Aggravated Rape To Remain A Capital Offense Will Strain An Already Crippled System And Risk Arbitrary Imposition of Death Sentences.

The parties' Joint Appendix filed with this Court states that there were 180 prosecutions for capital rape in Louisiana between 1995 and 2006. This number does not include Richard Davis who now sits with Patrick Kennedy on Louisiana's death row for non-homicide rape.[11] Nor does it include the 70–plus additional pending capital rape prosecutions in the state.[12] Similarly, the 180 does not include the 42

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[11] Richard Davis is now the second person—Patrick Kennedy, Petitioner, being the first—sentenced to death for non-homicide rape since 1964. Mr. Davis was tried in Caddo Parish, Louisiana and defended at trial by two public defenders. In December 2007, Mr. Davis's jury unanimously recommended a sentence of death. *State v. Richard Lee Davis*, Case No. 262,971, Sec. 3, 1st Judicial District Court, Caddo Parish, Louisiana.

[12] The actual number of pending capital rape indictments is surely larger than 70. Because of budget and time restraints, *amici* were not able to obtain case information from the following parishes: Ascension, Beauregard, Caddo, Calcasieu, East Baton Rouge, Jefferson, Jefferson Davis, Lafayette, LaSalle, Lincoln, Livingston, Natchitoches, Ouachita, St. Charles, Tangipahoa, and Webster. The Clerks of Court from these various parishes either would not provide the requested information by telephone or required fees up to $12/page to search for or fax the information. Given that some of the parishes are large population areas of the state (Caddo, Calcasieu, East Baton Rouge, Jefferson, Lafayette, Ouachita),

recent capital rape arrests and cases in which the defendant resolved his charges short of a death sentence.[13]

Indigent defense in Louisiana has been in a state of disaster for years. Study after study has shown that it is simply not providing indigent defendants with the effective assistance of counsel, even in non–capital cases. The simple reality is that the state cannot provide indigent capital defendants with the qualitatively raised standard of representation required by the *ABA Guidelines* and *LPDB Standards* given the state's failing indigent defense system. There are over 200 currently pending indictments for first degree (capital) murder in Louisiana. The addition of aggravated non–homicide rape to the list of capital offenses has strained a collapsing system beyond its limit.

This Court has held that representation falling short of the *ABA Guidelines* runs afoul of the prevailing norms of practice. *Strickland*, *Wiggins*,

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amici are confident that the actual number of pending capital rape indictments is surely larger than 70. In fact, of the parishes in which information was forthcoming, *amici* volunteers identified an additional 45 aggravated rape indictments which could be capital but not counted as such by *amici* for purposes of this brief since death qualifying information was not included in the indictments. Thus, given the omitted parishes and the additional 45 indictments, the number of actual pending capital rape indictments is more likely well over 100.

[13] *Amici* count 42 more cases (in addition to the 70) in Louisiana between 2006 and Feb. 13, 2008 where: (i) an arrest was made for capital rape (14 cases); (ii) a defendant charged with capital child rape resolved the case with a sentence less than death (the sentences imposed range from 5 years to life imprisonment) (26 cases); or (iii) the defendant was pre-trial on a capital rape indictment (2 cases).

Rompilla, supra. These *ABA Guidelines* are clear in mandating high quality representation:

> At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns. Counsel must be able to develop and implement advocacy strategies applying existing rules in the pressure–filled environment of high–stakes, complex litigation, as well as anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment.

31 Hofstra L. Rev. at 923.

Amici curiae in *Coker v. Georgia*, 433 U.S. 584 (1977), warned of the consequences that would follow upholding the death penalty in non–homicide rape cases. Where rape as well as murder is made a capital crime, "the criminal has every reason to kill his victim, since in this way he removes at a stroke the best possible witness against him without appreciably increasing the severity of his punishment if he is caught." Brief *Amici Curiae* of the American Civil Liberties Union, *et al.*, at 30 n.* (quoting Bedeau, *The Death Penalty in America* 273 (1967)), *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444). "[S]evere statutory penalties, epitomized by the death penalty, are unacceptable since they do not serve the goal of convicting and subjecting to criminal sanctions those who are in fact guilty of rape." *Id.*, at 31.

What *amici* say here is that upholding the death penalty in non–homicide aggravated rape cases will seriously threaten the Sixth Amendment right to effective representation of counsel in capital murder

cases, a right already strained to the limit in Louisiana. Coker *amici* further emphasized the "essentially unfettered discretion" of the district attorney in capital rape prosecutions. *Id.* at 29. The same thing is true here. *See* La. C.Cr.P. art. 61.

Amici are convinced that Louisiana's capital rape scheme increases the risk of ineffective representation of counsel in all other capital murder prosecutions and risks the arbitrary imposition of sentences of death in those few cases pushed to the limit of Louisiana's novel law by overzealous prosecutors.[14]

CONCLUSION

This Court should reverse the judgment of the Louisiana Supreme Court.

Respectfully submitted,

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[14] By way of example, *amici* refer the Court to Petitioner's Sentence Review Memorandum contained within the parties' Joint Appendix filed in this Court. The Memorandum describes 180 cases in which the defendants were sentenced to a penalty less than death for aggravated rape. *Amici* submit that nothing distinguishes Petitioner Patrick Kennedy and Richard Davis's (n. 11, *supra*) cases from the facts of the 180 cases described in the Memorandum or the additional 26 cases identified by *amici* where sentences less than death were imposed.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND TWELVE INNOCENCE PROJECTS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with more than 12,000 direct members and 35,000 affiliate members from all 50 states.[1] Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files amicus curiae briefs on various issues, including Eighth Amendment limitations on capital sentences, in this Court and other courts. *See, e.g.*, *Roper* v. *Simmons*, 543 U.S. 551 (2005).

The Twelve Innocence Projects, which are listed individually in the Appendix, investigate and litigate claims of wrongful conviction, particularly on behalf of indigent prisoners and death row inmates for whom postconviction DNA testing can provide conclusive proof of innocence. Amici pioneered the post-conviction DNA litigation model that has to date exonerated 213 innocent persons, including more than a dozen individuals wrongly convicted of non-homicide rape of a

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[1] Pursuant to Supreme Court Rule 37.6, the amici curiae certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

child. The Innocence Projects served as counsel or provided critical assistance in a majority of these cases, and in the course of this work, have seen inaccurate identifications and other failures by child witnesses contribute to convictions of innocent people for child rape. The Innocence Projects have an interest in ensuring that the legal system takes proper account of the limitations and weaknesses of child testimony. Submission of this brief is also consistent with their general mission to prevent future wrongful convictions by improving the truth-seeking functions of the criminal justice system.

INTRODUCTION

Child sexual abuse and rape are among "the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60 (1987). Because convictions for these utterly repugnant crimes often rest principally on the testimony of children, such cases raise difficult questions concerning the reliability of child witnesses, the risk that trial proceedings will inflict additional trauma on young victims, and defendants' constitutional rights to confront and cross-examine witnesses. In recent decades, legislatures and courts have responded to a sharp increase in reported cases of sexual abuse and rape of minors by relaxing various historical rules of procedure and evidence in order to facilitate criminal prosecutions where the victims and central witnesses are children.

Although many children, including victims of sexual abuse, are able to recall events accurately and to testify honestly about them, extensive social science research has documented common reliability problems with child testimony that call into question the broader reliability of child rape convictions and sentences. The core problem, supported by an overwhelming consensus in the literature, is that children are susceptible to suggestion in ways that adults are not. This makes child witnesses particularly vulnerable to questioning by parents, police, teachers, medical professionals, and other adults who may approach an interview with preconceptions and/or use suggestive questions or techniques. Even well-meaning adults who interact with or treat child victims may shape their testimony unintentionally. Moreover, social science research strongly suggests that some children who make false accusations following suggestive interviews come to genuinely and

permanently believe their accusations, and that recantation of accusations may be a normal and relatively common phenomenon even among victims who initially tell the truth about their abuse. In light of such behaviors, it is perhaps little surprise that researchers cannot readily detect false testimony or identify particular categories of child witnesses who are particularly susceptible to suggestion. Therefore, children may offer convincing testimony that is so substantially shaped by the suggestions of adults as to be unreliable.

Allowing juries to impose the death penalty based on evidence presenting such serious reliability concerns—particularly when admitted pursuant to relaxed evidentiary and procedural requirements—cannot be squared with established precedent. This Court has consistently sought to ensure that the death penalty is applied cautiously and fairly, only to the worst of the worst offenders. *See, e.g.*, *Roper* v. *Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (citation omitted)). In addition, the Court's Eighth Amendment decisions have repeatedly demanded heightened reliability in capital cases in part to guard against the risk that an innocent defendant might be put to death. *See Johnson* v. *Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." (citations omitted)); *see also Herrera* v. *Collins*, 506 U.S. 390, 407 n.5 (1993) (acknowledging "the importance of

ensuring the reliability of the guilt determination in capital cases in the first instance").

Against this constitutional requirement of "measured, consistent application and fairness to the accused" in death-eligible prosecutions, *Eddings* v. *Oklahoma*, 455 U.S. 104, 111 (1982), child rape cases lack the reliability needed for the irremediable penalty of death. As in *Roper* and *Atkins* v. *Virginia*, 536 U.S. 304 (2002), where certain characteristics of the defendants created special risks of wrongful execution, the Court should hold that the Constitution categorically forbids imposition of the death penalty for child rape where no death occurs—a heinous crime to be sure, but one in which the evidence often relied upon creates special risks of wrongful execution.

ARGUMENT

I. Child Witness Testimony Is Central To Most Child Sexual Abuse And Rape Prosecutions

Child sexual abuse convictions are often "based primarily, if not solely, on the word of the victims involved." Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2118 (1996). These prosecutions are frequently "'she said, he said' cases that ultimately rely upon the jury's assessment of the relative credibility of opposing witnesses." *Ex parte Thompson*, 153 S.W.3d 416, 422 (Tex. Crim. App. 2005) (Cochran, J., concurring). Although many jurisdictions once imposed a corroboration requirement for testimony by children in sexual abuse cases, such rules have been abolished in nearly every jurisdiction since the 1980s. Bruck et al., *The Child and the Law*, in 4 *Handbook of Child Psychology* 777 (Renninger & Sigel eds., 6th ed., 2006). Accordingly, convictions may now hinge entirely on the per-

ceived credibility of a child witness. *See, e.g.*, *State* v. *Polkey*, 529 So. 2d 474, 476 (La. Ct. App. 1988).

Child testimony is particularly essential because medical evidence of child sexual abuse and rape is frequently unavailable, "either because of the nature of the abuse or because children heal quickly and the crime is often reported well after it occurred." Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 Ind. L.J. 1009, 1009 (2007); *see, e.g.*, *United States* v. *Charley*, 189 F.3d 1251, 1263 (10th Cir. 1999) (summarizing expert testimony that physical exams appear normal in "90 percent" of suspected child sexual abuse cases and that it would be surprising to find a traumatized area after more than 72 hours); *State* v. *Williams*, 950 So. 2d 126, 130 (La. Ct. App.), *writ denied*, 966 So. 2d 599 (La. 2007) (summarizing expert testimony that penetration often leaves no physical evidence because child tissues heal quickly); *State* v. *Johnson*, 652 So. 2d 1069, 1072 (La. Ct. App. 1995) (summarizing expert testimony that evidence of trauma during child rape examinations is unusual because children heal quickly). Therefore, "the determination of sexual abuse can rarely rely on a physical examination alone and [the] consideration of all the components of the investigation—*especially the information obtained from the child—is essential.*" McCann et al., *Genital Findings in Prepubertal Girls Selected for Nonabuse: A Descriptive Study*, 86 Pediatrics 428, 438 (1990) (emphasis added).

II. SOCIAL SCIENCE RESEARCH DEMONSTRATES THAT CHILD WITNESSES CAN LACK THE RELIABILITY NEEDED TO SUPPORT A DEATH SENTENCE

Extensive social science research demonstrates that child witnesses are susceptible to suggestion in ways and to a degree that adults are not. As a result of this unique vulnerability, children can be led, inadvertently or maliciously, to allege that they have been sexually abused when in fact they have not, or to misidentify their abuser.

A. A Consensus In The Scientific Community Confirms That Children Are Susceptible To Suggestion

Decades of research and dozens of studies establish that while young children are capable of being accurate witnesses, they are also particularly likely to confirm allegations posed by suggestive interviewers, even when those allegations are false.[2] When confronted with many common elements of criminal investigations, such as leading or repeated questions and pressurized or repeated interviews,[3] many children will give—and in some instances even come to believe—whatever they perceive to be the account the interviewer is seeking. Notably, this process can occur even when the inter-

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[2] To be sure, children are not "invariably suggestible." 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §1.10[A] (2005). The literature also establishes that many children are capable of providing accurate testimony and that "[c]hildren can resist suggestive questions" in some instances. *Id.*

[3] "In legal contexts, exposure to repeated questions and interviews is common for many child witnesses." Quas et al., *Repeated Questions, Deception, and Children's True and False Reports of Body Touch*, 12 Child Maltreatment 60, 61 (2007).

viewer (who might be a law enforcement officer, medical professional, teacher or parent) lacks any improper intent and is genuinely seeking to elicit a truthful account from the child.

Courts have recognized the unreliability of child testimony. This Court has acknowledged in the child abuse context the need to expose "the false accuser, or reveal the child coached by a malevolent adult." *Coy* v. *Iowa*, 487 U.S. 1012, 1020 (1988).[4] Justice Scalia has likewise noted that there are "'special' reasons" to be suspicious of child testimony, for "studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality." *Maryland* v. *Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting). Lower courts have also recognized that child testimony can be unreliable. *See Washington* v. *Schriver*, 255 F.3d 45, 57 (2d Cir. 2001) (noting that "[a]n emerging consensus in the case law relies upon scientific studies to conclude that suggestibility and improper interviewing techniques are serious issues with child witnesses"); *see also Fowler* v. *Sacramento County Sheriff's Dep't*, 421 F.3d 1027, 1039 n.7 (9th Cir. 2005) ("We note fur-

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[4] In *Idaho* v. *Wright*, 497 U.S. 805 (1990), which was not a death penalty case, this Court cited a treatise for the proposition that "use of leading questions with children, when appropriate, does not necessarily render responses untrustworthy." *Id.* at 819 (citing J. Myers, *Child Witness Law and Practice* § 4.6, pp. 129-134 (1987)). The Court nevertheless implicitly recognized that leading questions can be very damaging to the reliability of child witnesses. *See id.* (noting that certain safeguards, including the avoidance of leading questions, "may well enhance the reliability of out-of-court statements of children regarding sexual abuse," but declining to hold that particular interview procedures were constitutionally required).

ther that fantasy by child witnesses is well-documented."); *Danaipour* v. *McLarey*, 386 F.3d 289, 298 (1st Cir. 2004) (noting that "statements by a young child, even if accurately recounted by an adult, may not reflect the truth" for reasons including coaching, repeated inquiry, and a child's desire for attention).

Indeed, within the child-development research community, "there is an overwhelming consensus that children are suggestible." Ceci & Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 36 (2000); *see also* Anderson, 69 S. Cal. L. Rev. at 2146 (describing a "consensus in the social-science literature" on this point). Researchers debate the quantum of suggestion needed to alter a child's account and, as a policy matter, whether the benefits of eliciting recollections from child victims and admitting them in criminal proceedings outweigh the risk of erroneous convictions. *Compare* Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 Cornell L. Rev. 1004 (1999) (arguing that a class of researchers overstate the ease with which children can be induced to make false allegations of sexual abuse and understate the harms of failing to prosecute alleged abusers), *with* Ceci & Friedman, 86 Cornell L. Rev. 33 (responding to Lyon). But even the most ardent defenders of child testimony concede that this susceptibility of children to suggestion by adults can lead to allegations of abuse against innocent people. *See, e.g.*, Goodman, *Children's Eyewitness Memory: A Modern History and Contemporary Commentary*, 62 J. of Soc. Issues 811, 818 (2006) (acknowledging that, in the 1990s, "[i]t became increasingly clear ... that there were conditions under which

children were susceptible to false suggestion, even about child abuse");[5] Myers et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 Law & Contemp. Probs., No. 1, 3, 30 (2002) (recognizing a slew of factors that may "taint" a child's report).[6]

Although there are differences on questions of degree, there is strong support in the literature for the proposition that several techniques, used independently, or especially in combination, can seriously impair the reliability of child testimony:

- Children are particularly susceptible to influence from leading questions. When researchers in one study used leading questions to ask girls whether they had been sexually touched during a medical examination, 8% of the girls falsely reported having been touched. *See* Saywitz et al., *Children's Memories of a Physical Examination Involving Genital Touch: Implications for Reports of Child Sexual Abuse*, 59 J. Consulting & Clinical Psychol. 682, 687 (1991). Other studies have shown even more significant effects from leading questions. *See, e.g.*, Peterson & Bell, *Children's Memory for Traumatic Injury*, 67 Child Dev. 3045, 3059 (1996) (finding that children made roughly five times as many errors in response to directed questions as compared to open-ended ones when asked about non-abuse related but

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[5] Professor Goodman has been described as "the scholar most favored by child advocates," Ceci & Freidman, 86 Cornell L. Rev. at 46, and as the "researcher-heroine of the child protection movement," Lyon, 84 Cornell L. Rev. at 1015.

[6] Professor Myers is a leading defender of child testimony. *See* Ceci & Friedman, 86 Cornell L. Rev. at 35.

serious injuries). Even researchers who defend child testimony acknowledge that "there is no denying that suggestive questions can undermine accuracy." 1 Myers, § 1.15[K].

- "Children are sometimes more suggestible when questioned by an authority figure." *Id.* at § 1.10[B]. This may be because children believe adult authority figures are omniscient and truthful, which would suggest to them that their own perceptions are inaccurate; children may also just want to be accommodating to the adult. *See* Ceci & Bruck, *Jeopardy in the Courtroom* 258-259 (1995); *see also* Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 Duke L.J. 691, 692 (1991) (noting that children "are susceptible to accommodating their reports of events to fit what they perceive the adult questioner to believe").

- Children can give incorrect answers when they are led to believe under questioning that their initial answers were wrong. In one study, children were told that they were not doing well after they had accurately denied that an incident had taken place. Those children were then nearly three times as likely as un-reinforced children to agree to a plausible but false suggestion posed in a follow-up question. Moreover, these children were more than ten times likelier to agree to a fantastic false suggestion. *See* Garven et al., *Allegations of Wrongdoing: The Effects of Reinforcement on Children's Mundane and Fantastic Claims*, 85 J. Applied Psychol. 38, 41-43 (2000).

- Children may make false allegations after repeated interviews if they believe that authority figures

will not accept their denials. After all, children, unlike adults, "are required to continue until the adult decides to terminate." Ceci & Bruck, *Jeopardy in the Courtroom*, at 259. For instance, an eleven-year-old boy from Jordan, Minnesota, accused his parents of abuse after investigators continued to press him following his repeated denials of abuse over a series of interviews. He later explained that he made the allegation because he was "just sick of being badgered." *See* Ceci et al., *Unwarranted Assumptions About Children's Testimonial Accuracy*, 3 Ann. Rev. of Clinical Psychol. 311, 319 (2007); *see also Craig*, 497 U.S. at 868 (Scalia, J., dissenting) (referring to the "tragic" investigations in Jordan, Minnesota).

- An interviewer may induce a false accusation from a child by telling her that her friends have already made that same accusation. *See* Myers et al., 65 L. & Contemp. Probs., No. 1, at 30 (noting that "peer pressure" can be a source of "taint" in children's reports). Children are also prone to recount experiences they heard from their peers as if they were their own. In one study, children claimed to be witnesses to an incident that they had only heard about from other students at the same rate as the actual witnesses. *See* Principe et al., *Believing Is Seeing: How Rumors Can Engender False Memories in Preschoolers*, 17 Psychol. Sci. 243, 243 (2006).

- Children may make false allegations against someone whom they have heard discussed in a negative light. One frequently cited study found that 11% of five- and six-year-old children, after hearing prejudicial remarks regarding a particular individual, made false allegations against that individual and

maintained those allegations even when challenged by the interviewer. *See* Ceci & Bruck, *Jeopardy in the Courtroom*, at 131.

- Preschool-aged children may make allegations without fully comprehending what they are alleging. *See* Ceci & Bruck, *Children's Suggestibility: Characteristics & Mechanisms*, in 34 *Advances in Child Dev. & Behav.* 247, 253 (Kail ed., 2006) (noting that children may provide answers to yes or no questions "even though they may not know the answer or understand the question").
- Children may allege abuse after coaching from an adult. *See, e.g.*, Ceci et al., *Children's Allegations of Sexual Abuse: Forensic and Scientific Issues*, 1 Psychol. Pub. Pol'y & L. 494, 506 (1995) ("No one familiar with the scientific research ought to doubt that some children could be brought to make false claims of sexual abuse if powerful adults pursue them repeatedly with [suggestive] enjoinders."); *see also Coy*, 487 U.S. at 1020 (acknowledging the risk of child "false accuser[s]" and "coach[ing] by a malevolent adult"); *cf.* Quas et al., 12 Child Maltreatment at 64 (finding that children instructed to lie can do so fairly effectively).

Recent research indicates that the period of vulnerability to many of the conditions for suggestion extends well beyond preschool ages, and includes children who are near the upper bound of Louisiana's capital rape statute. *See* La. Rev. Stat. Ann. § 14:42(A)(4). While older children are less suggestible than preschoolers, they are still significantly more suggestible than older witnesses. *See* Warren & Marsil, *Why Children's Suggestibility Remains a Serious Concern*, 65 Law & Contemp. Probs., No. 1, 127, 127-131 (2002) (col-

lecting studies). "In the past few years, it has become more apparent that ... suggestibility levels remain high throughout the elementary school years." Bruck & Melnyk, *Individual Differences in Child Suggestibility: A Review and Synthesis*, 18 Applied Cognitive Psychol. 947, 948 (2004) (citation omitted); *see* Bruck & Ceci, *Forensic Developmental Psychology: Unveiling Four Common Misconceptions*, 13 Current Directions in Psychol. Sci. 229, 231 (2004) ("Susceptibility to suggestion is highly common in middle childhood[.]"); *cf.* Myers, § 1.10[A] ("By the time children near adolescence, most children approach adult levels of suggestibility.").

B. Suggestive Interviewing Techniques Remain Common In Child Sex Abuse Cases

Despite a general awareness among child development professionals that the testimony of child witnesses can be influenced by adults, "there is good reason to believe the use of highly suggestive questions remains very common, and that these questions present a significant possibility that children will make false allegations even on matters such as sexual abuse." Ceci & Friedman, 86 Cornell L. Rev. at 36. At least four factors support this conclusion.

First, the existing empirical evidence confirms that suggestive interviews continue to occur. For example, one researcher, while disputing the overall impact of leading questions on reports of child abuse, acknowledges that "the limited observational research on real-world interviews demonstrates that interviewers ask few open-ended questions, many specific questions, and some leading questions." Lyon, 84 Cornell L. Rev. at 1036; *see id* (stating that across three studies, "approximately ten percent of interviewers' questions are

'suggestive,' and an average interview contained from five to ten suggestive statements"); Ceci & Friedman, 86 Cornell L. Rev. at 66 n.168 (analyzing data and concluding that "some particularly troublesome techniques, though usually constituting a small part of the interaction in any given interview, are extremely common"); Warren & Marsil, 65 Law & Contemp. Probs., No. 1, at 144-45 (collecting studies).

Second, although efforts have been made to train professional interviewers to avoid interview techniques that direct children to a particular account, this training has often proved unsuccessful. *See* Warren & Marsil, 65 Law & Contemp. Probs. No. 1, at 144-145. In fact, several studies indicate that interviewers persist in using suggestive techniques even after receiving training instructing them in how to conduct less risky interviews. "Extant research thus demonstrates that interviewer training is effective in reducing problematic questioning techniques only when training is both intensive and extensive, and only when it includes practice, individualized feedback, and follow-up." *Id.* at 147.

Third, suggestibility is not limited to formal interviews. "Suggestions may be made by parents, other adults, or other children prior to the first formal investigative interview or between repeated forensic or clinical interviews." *Id.* at 134. Indeed, "[o]fficial investigators may be trained to avoid suggestiveness; most parents and teachers are not." Ceci & Friedman, 86 Cornell L. Rev. at 59. Therefore, in some cases, by the time the professional interviewer encounters the witness, the damage may already have been done.

Some parental suggestion may be inadvertent or well-intentioned. *Cf.* Poole & Lindsay, *Assessing the Accuracy of Young Children's Reports: Lessons from*

the Investigation of Child Sexual Abuse, 7 Applied & Preventive Psychol. 1, 4 (1998) (citing a studying finding that mild and unintentional suggestion from a parent can affect children's reports outside of the abuse context). However, the dangers of parental suggestion are particularly acute in cases in which child custody and divorce are implicated. *See* Ceci & Bruck, *Jeopardy in the Courtroom*, at 33 (analyzing studies and concluding that, despite some studies to the contrary, "the rates of false reports [of abuse] are higher among divorced families").

Finally, some interviewers, supported by a cadre of researchers, have no desire to abandon leading questions and other potentially prejudicial techniques, at least not completely. This group ardently believes that "sexually abused children do not readily disclose their abuse because of shame, guilt, and fear," Bruck & Ceci, 13 Current Directions in Psychol. Sci. at 229,[7] and that "young children[] [have] difficulty responding to open-ended questions," 1 Myers, at §1.15[K]. Therefore, they insist that leading questions can be necessary to persuade genuine abuse victims to disclose their experiences. *See id.* For example, some researchers have concluded that "although there is a risk of increased error with doll-aided directed questions, there is an *even greater* risk that not asking about [abuse] leaves the majority of [abuse] unreported." Saywitz et al., 59 J. Consulting & Clinical Psychol. at 690 (emphasis added);

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[7] Ceci and Bruck, among others, dispute the contention that children do not readily disclose. *See, e.g.*, Bruck & Ceci, 13 Current Directions in Psychol. Sci. at 229. Regardless of which side has the better of this argument, it is sufficient to note here that some professionals advocate continued use of potentially prejudicial interview techniques.

see also Lyon, 84 Cornell L. Rev. at 1082 (criticizing researchers who emphasize the weaknesses of children's testimony for failing to recognize the need to "minimize false acquittals as well as false convictions").

Even if these researchers' policy arguments in favor of limited use of suggestive interview techniques are correct, there is general agreement in the field that such an approach produces an increased risk of false testimony.

C. False Testimony By Children Is Not Readily Detectible

The social science literature confirms that false testimony produced by suggestion is not immediately recognizable as such, and that the adversarial criminal justice system cannot be relied upon to expose such testimony.

When children bend to suggestion and offer inaccurate accounts, their "false reports are not simply repetitions or monosyllabic responses to leading questions. Under some conditions, their answers go well beyond the suggestion and incorporate additional details and emotions." Ceci & Bruck, 34 *Advances in Child Dev. & Behav.* at 261. Likewise, "linguistic markers do not consistently differentiate true from false narratives that emerge from repeated suggestive interviews." *Id.* In fact, children offering false testimony motivated by suggestion can give very compelling accounts, complete with supplemental detail beyond what was originally suggested. *See* Bruck et al., *The Nature of Children's True and False Narratives*, 22 Developmental Rev. 520, 547 (2002) (finding that increases in inaccuracy brought about through suggestive interview techniques

correlated with increases in the persuasiveness of those accounts).

Moreover, in some cases, children who make false accusations following suggestive interviews genuinely and permanently come to believe their own accusations. *See* Ackil & Zaragoza, *Memorial Consequences of Forced Confabulation: Age Differences in Susceptibility to False Memories*, 34 Developmental Psychol. 1358, 1369 (1998) (finding that forcing children to provide false accounts can lead them to recall the false accounts as true and concluding that "the results certainly suggest that the surest way to preserve the integrity of children's memories is to avoid pressuring them to discuss incidents that may not have transpired"); Ceci & Bruck, 34 *Advances in Child Dev. & Behav.* at 62 ("At times, suggestive interviewing techniques result in false beliefs. Children who incorporate the suggestions of their interviewers come to truly believe that they were victims."). Because these witnesses fully believe that they are testifying truthfully, additional questioning is unlikely to prompt them to retract their accusations, and their accounts are unlikely to seem fabricated.

Research confirms that children who make false reports following suggestive interviews tell their stories convincingly. In one study, videotapes were made of children, some giving true reports and others making false allegations following suggestive interviews. When shown the tapes, "[e]xperts who conduct research on the reliability of children's reports, who provide therapy to children suspected of having been abused, and who carry out law enforcement interviews with children, generally failed to detect which of the children's claims were accurate and which were not, despite being confident in their judgments." Ceci &

Bruck, 34 *Advances in Child Dev. & Behav.* at 260-261. In another study, children ages seven to nine were instructed to lie to adult mock jurors, who proved largely unable to detect the falsehoods. *See* Quas et al., 12 Child Maltreatment at 61 (discussing Orcutt et al., *Detecting Deception in Children's Testimony: Fact Finders' Ability to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 Law & Human Behav. 339 (2001)).

Nor can the dangers of false testimony be eliminated by identifying particular types of children as suggestible. "With the exception of children with [mental retardation], the scientific evidence suggests that one cannot, at present, identify individual children who are most at risk for heightened suggestibility. Even when effects are found, these are not large and would not reliably identify or suggest to the court that a specific child's profile indicates high or low suggestibility." Bruck & Melnyk, 18 Applied Cognitive Psychol. at 990; *see* Warren & Marsil, 65 Law & Contemp. Probs., No. 1, at 139 (noting that "individual difference research cannot now, and perhaps never should be," used to identify particular children as suggestible).

Finally, recantation is widely understood to be normal behavior for genuine abuse victims, and not simply for accusers whose allegations were a product of suggestion. This understanding significantly undercuts what in other instances would be a valuable indicator of false accusations. While percentages vary widely across studies, several studies have found that more than 20% of children who allege abuse later recant. *See* London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 Psychol. Pub. Pol'y & L. 194, 216-219 (2005) (collecting studies); Lyon, *Scientific Support for*

Expert Testimony on Child Sexual Abuse Accommodation, in *Critical Issues in Child Sexual Abuse* 107, 128-130 (Conte ed., 2002) (same); *see also United States* v. *Rouse*, 329 F. Supp. 2d 1077, 1080 (D.S.D. 2004) (summarizing expert witness testimony that "published studies show the rate of recantation varies from 3% to 27% of children who have reported sexual abuse").

According to the most often cited theory for the cause of such recantation rates, Child Sexual Abuse Accommodation Syndrome (CSAAS), recantation is a natural step in the disclosure process in genuine abuse cases and is brought on by shame, guilt and fear over disclosure. *See* Malloy et al., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. Am. Acad. of Child & Adolescent Psychiatry 162, 163 (2007); Bruck & Ceci, 13 Current Directions in Psychol. Sci. at 229. Indeed, a recent study found a recantation rate of 23.1% and concluded that recantation is associated with familial pressure to recant, not false allegations. *See* Malloy et al., 46 J. Am. Acad. of Child & Adolescent Psychiatry at 162.

Some researchers contend that expert testimony should be allowed where an accuser has changed his or her account because "it is important for jurors to hear that a surprising number of sexually abused children retract their allegations." Lyon, *Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation*, at 107. While rules vary across jurisdictions, "[m]ost courts allow child sexual abuse accommodation testimony to rebut attacks on a child's credibility." *Id.* at 110 (citation omitted). Louisiana, for example, allows expert testimony "for the limited purpose of rebutting attacks on the victim's credibility based on inconsistent statements, limited disclosures, or recantations," *State* v. *Foret*, 628 So. 2d 1116, 1129 (La. 1993), but prohibits

testimony "'d[illegible]y concerning the particular victim's credibility,'" [illegible] 1130 (quoting *State* v. *Spigarolo*, 556 A.2d 112, 123 (Conn. 1989)).

CSAAS has been criticized by researchers who suggest that genuine abuse victims recant only rarely and that studies finding high levels of recantation may erroneously treat false allegations of abuse as true allegations. *See* London et al., 11 Psychol. Pub. Pol'y & L. at 216-219; *see also Gersten* v. *Senkowski*, 426 F.3d 588, 611 (2d Cir. 2005) (concluding that CSAAS is not scientifically valid as a "generalized explanation of children's reactions to sexual abuse").

Regardless of which side has the better of this academic dispute, death sentences for a crime with such high recantation rates should not be countenanced. If the CSAAS theory is correct, the diminished significance of a recantation, emphasized to the jury by an expert witness, adds an arbitrariness that unacceptably heightens the risk of wrongful executions. On the other hand, if high recantation levels demonstrate that false claims are all too common, death sentences for child rape lack the reliability demanded by the Eighth Amendment.

D. Children Have Made False Allegations Of Sexual Abuse Because Of Suggestion In Numerous Actual Cases

Suggestion does not merely lead children to make false reports in controlled studies performed in psychology labs; suggestion has led children to make false criminal accusations, with tragic consequences. For example, in 1984, Frederico Macias was convicted of capital felony murder, largely on the testimony of a nine-year-old witness named Jennifer F. Ceci & Bruck, *Jeopardy in the Courtroom*, at 17-18. Testifying at a

stay of execution hearing four years later, Jennifer described the process that had elicited her original accusation:

> Because different people asked me so many different questions about what I saw, I became confused. I thought I might have seen something that would be helpful to the police. I didn't realize that it would be so important. I thought they wanted me to be certain, so I said I was certain even though I wasn't. Originally, I think I told the police just what I saw. But the more questions I was asked, the more confused I became. I answered questions I wasn't certain about because I wanted to help the adults.

Id. at 304. After nine years on death row, Macias secured habeas relief. *See Martinez-Macias* v. *Collins*, 979 F.2d 1067 (5th Cir. 1992). When the prosecution represented the case, a new grand jury found insufficient evidence to indict. *See* Cohen, *The Difference A Million Makes*, Time, June 9, 1995, at 43.

The precise frequency at which children make false accusations because of factors like those described by Jennifer F. is not known and, to the extent it goes undetected, is by its very nature unknowable. *Cf.* Ceci & Bruck, *Jeopardy in the Courtroom*, at 31 (noting that attempts to quantify false allegations of child abuse overall are likely to omit cases where allegations are "the result of subtle adult coaching or other faulty interviewing techniques"). It is clear, however, that suggestive interviews have on multiple occasions led children to make false allegations of abuse.

Perhaps most famously, "[d]uring the 1980s, a series of highly publicized 'daycare ritual abuse cases'

erupted across the United States." Garven et al., 85 J. Applied Psychol. at 38. In Manhattan Beach, California, for example, children at the McMartin Preschool who were suggestively interviewed accused seven of their teachers of sexually abusing them (though no one was convicted). *See id.* Many of the daycare abuse cases in other communities did lead to convictions, but after the scope of suggestive interviewing techniques used in the investigations was exposed, more than half of the convictions were overturned on appeal. *See* Hayward & Mashberg, *Upheaval in '80s Put the Spotlight on Child Abuse*, Boston Herald, Dec. 3, 1995, at 23; Rabinowitz, *No Crueler Tyrannies* 10-21 (2003) (discussing the conviction and successful appeal of daycare teacher Margaret Kelly Michaels).

Numerous other examples outside the daycare context can be found as well. "Wenatchee Washington seems to have been among the many towns engulfed by sexual witchhunts in the 1980's and 1990's," and after forty-three people had been charged with 29,727 counts of abuse, "few charges stood up in court except against the government's own witness." *Devereaux* v. *Abbey*, 263 F.3d 1070, 1083 (9th Cir. 2001) (en banc) (Kleinfeld, J., concurring in part, dissenting in part). Likewise, John Stoll spent twenty years in a California prison following his conviction for abusing six children, including his own son. After four of the children ultimately acknowledged that their trial testimony had been false and a fifth claimed to have no memory of molestation, Stoll was released because "improper interview techniques" employed by the investigating officers "created a substantial risk that [the abuse victims'] trial testimony was unreliable." *Stoll* v. *County of Kern*, No. 1:1:05-cv-01059, 2007 WL 2815032, at *2 (E.D. Cal. Sept. 25, 2007).

Many of the same techniques that can impel children who have never been molested to allege abuse can also cause genuinely abused children to misidentify their assailant. In particular, research strongly demonstrates that children are likely to find lineup procedures suggestive and to identify one of the individuals presented, even if the actual perpetrator is not included in the lineup. "Although children over the age of five years typically perform as well as adults when the culprit is present in the lineup, children consistently produce a much higher rate of false positives in culprit-absent lineups." Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide For Law Enforcement*, 53 Ark. L. Rev. 231, 263 n.125 (2000); *see* Ross et al., *Children's Susceptibility to Misidentifying a Familiar Bystander From a Lineup: When Younger is Better*, 30 Law & Hum. Behav. 249, 250 (2006) (citing studies for the proposition that in lineups, "younger children tend to make fewer correct rejections than adults").

Justice Blackmun recognized the potential problems with eyewitness identifications by children in his dissent in *Arizona* v. *Youngblood*, 488 U.S. 51 (1988). The principal evidence that Larry Youngblood had raped a young child was the testimony of the ten-year-old victim who had picked Youngblood out of a photographic lineup. *Id.* at 53. Justice Blackmun observed: "Studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults." *Id.* at 72 n.8 (1988). Youngblood was exonerated by DNA evidence twelve years after this Court affirmed his conviction. *See* Whitaker, *DNA Frees Inmate Years After Justices Rejected Plea*, N.Y. Times, Aug. 11, 2000, at A12.

Youngblood's experience is not unique. For example, Marvin Mitchell, Jimmy Ray Bromgard, and Ronnie Bullock were all exonerated by DNA evidence after serving many years is prison for allegedly sexually assaulting young children who had identified them in lineups. *See Mitchell* v. *City of Boston*, 130 F. Supp. 2d 201, 204-206 (D. Mass. 2001); *State* v. *Bromgard*, 866 P.2d 1140, 1141 (Mont. 1993); *People* v. *Bullock*, 507 N.E.2d 44, 45-46 (Ill. App. Ct. 1987); *Former Convict Wins Clemency in Rape Case*, Chi. Trib., Mar. 29, 1998, at C3; *Exonerated of Rape, Man Gets $3.5 Million*, Chi. Trib., Jan. 12, 2008, at C4.

III. Evidentiary Procedures Employed In Many Child Rape Cases Add Further Unreliability

Despite serious concerns about the reliability of child testimony, courts and legislatures over several decades have relaxed evidentiary and procedural requirements in child sexual abuse and rape prosecutions in an effort to balance competing public policy interests and to protect victims from further trauma. States have abolished corroboration rules and categorical bars against testimony by young children in criminal court proceedings and have relaxed confrontation procedures and hearsay standards. *See generally* Bruck et al., *The Child and the Law*, at 777; Anderson, 69 S. Cal. L. Rev. at 2122-2129. This Court has upheld some of these modifications in a non-death case, *Maryland* v. *Craig*, 497 U.S. at 857 (upholding testimony by closed circuit television), but these procedural changes are far more problematic in death-penalty cases.

Starting with "the irreducible literal meaning of the [Confrontation] Clause," for example, this Court has held that the Sixth Amendment generally "guarantees the defendant a face-to-face meeting with wit-

nesses appearing before the trier of fact." *Coy* v. *Iowa*, 487 U.S. at 1016, 1021. *Craig* approved certain limitations on the right to confront child witnesses, holding that states may use closed circuit television or other methods of "rigorous adversarial testing" short of "face-to-face confrontation" where a court makes a case-specific finding that there is potential for trauma to child witnesses from testifying in open court. 497 U.S. at 857. Yet as this Court has recognized, limitations on the right to face-to-face confrontation have a real impact upon "'the perception as well as the reality of fairness'" in criminal proceedings. *Coy*, 487 U.S. at 1019 (citation omitted). "[F]ace-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id.* Even with two-way closed circuit television, "something is lost in the translation" during "virtual" confrontations, such that "a defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the courtroom." *United States* v. *Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005).[8]

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[8] In *Craig* itself, the child witness was questioned by the prosecutor and defense attorney in a separate room, while the judge, jury, and defendant observed on video monitor. *Id.* at 841-842. At least one court has held that the Confrontation Clause is satisfied where the defendant had an opportunity to submit written interrogatories to be read to a child witness by a neutral and detached questioner and videotaped prior to trial. *See Rangel* v. *State*, 199 S.W.3d 523, 536 (Tex. App. 2006) (analyzing procedures under *Crawford* v. *Washington*, 541 U.S. 36 (2004)), *pet. for review dismissed as improvidently granted*, No. PD-0447-06, 2008 WL 375446 (Tex. Crim. App. Feb. 13, 2008).

The reliability of convictions for child rape and sexual abuse is further undermined by the fact that hearsay statements are a "dominant feature" of such litigation. Raeder, 82 Ind. L.J. at 1009. The hearsay rule regards out-of-court declarations as inherently suspect because they were not made under oath or subject to cross-examination and other trial safeguards. *See, e.g.*, *Williamson* v. *United States*, 512 U.S. 594, 598 (1994); *Chambers* v. *Mississippi*, 410 U.S. 284, 298 (1973). Admission of hearsay may also implicate the Confrontation Clause; for instance, admission of "testimonial" hearsay statements made during prior court proceedings, police investigations, and similar circumstances is permitted under *Crawford* v. *Washington*, 541 U.S. 36 (2004), only if the witnesses are available for cross examination or if the witnesses are deemed "unavailable" *and* there was a prior opportunity for cross-examination.

Despite these concerns, courts have relaxed hearsay rules applicable to statements by child witnesses in several ways. First, they have admitted plainly testimonial hearsay by child witnesses who take the stand but whose lack of memory, communication skills, or composure to answer even basic questions makes them functionally unavailable for cross-examination by defendants. *See, e.g.*, *People* v. *Sharp*, 825 N.E.2d 706, 712-713 (Ill. App. Ct. 2005) (upholding admission of audiotape of and testimony concerning child witness interview with child advocacy worker after witness was unable to respond to five direct examination questions about key events); *State* v. *Price*, 146 P.3d 1183, 1192-1193 (Wash. 2006) (en banc) (upholding admission of child witness's statement to investigating police officer where witness repeatedly testified on direct that she

forgot defendant's actions and her previous statements about them).[9]

Although *United States* v. *Owens*, 484 U.S. 554, 560 (1988), and *California* v. *Green*, 399 U.S. 149, 166-168 (1970), held generally that the Confrontation Clause is satisfied where a witness is made available for cross-examination concerning a prior out-of-court statement, it is questionable whether the ability to challenge a young (and often emotionally distraught) child's failure of memory provides defendants with a "realistic weapon[]" as those cases envisioned. *Owens*, 484 U.S. at 560; *see also Green*, 399 U.S. at 159, 161 (holding admission of hearsay permissible "as long as the defendant is assured of full and effective cross-examination" at trial so as to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement"). "Unlike the situation when an adult acts on the witness stand in an way that raises questions about that person's ability or willingness to proceed, similar conduct

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[9] *See also, e.g.*, *State* v. *Salazar*, 166 P.3d 107, 108-110 (Ariz. Ct. App. 2007) (upholding playing of recorded interview with police to refresh child witness's memory after she refused to answer questions and testified that she did not remember prior statements to police); *In re S.L.G.*, No. A06-1254, 2007 WL 2609801, at *2, *4 (Minn. Ct. App. Sept. 11, 2007) (unpublished) (upholding admission of an out-of-court statement to a "forensic interviewer" where child took stand but was unable to testify as to details of alleged assault, and holding that statement was not testimonial).

Similarly, in this case, one piece of critical evidence was a videotaped interview that the victim L.H. gave to officials at the Child Advocacy Center. While L.H. took the stand at trial, she quickly "lost her composure," and was unable to describe the rape to the jury. Pet. App. 15a. The Louisiana Supreme Court nevertheless upheld the admission of the videotape, concluding that L.H. was sufficiently "available" under *Crawford*. *Id.* 35a-36a.

by a child who has apparently been tragically victimized can only be examined delicately, if at all." Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 Ind. L.J. 917, 921 (2007). Thus, although this Court has generally rejected arguments that the Confrontation Clause guarantees defendants a particular level of effectiveness in cross-examination, *see, e.g.*, *Delaware* v. *Fensterer*, 474 U.S. 15, 19-20 (1985) (per curiam), the admission of hearsay statements by effectively unavailable child witnesses results in the "principal evil" at which the Confrontation Clause was directed: the "use of *ex parte* examinations as evidence against the accused" without an adequate opportunity to cross-examine the witness *either* at the time the statements were made *or* at trial, *Crawford*, 541 U.S. at 50, 57.

Second, courts also regularly admit hearsay in child abuse and rape cases by finding that the particular statement—such as an accusatory declaration made by a child to a family member or medical examiner—constitutes non-testimonial hearsay under *Crawford*. Many such decisions raise serious questions about the distinction between "testimonial" and "nontestimonial" statements under *Crawford* and its progeny. *See, e.g.*, *State* v. *Bobadilla*, 709 N.W.2d 243, 256 (Minn.) (statement to child-protection worker in presence of law enforcement officer was nontestimonial), *cert. denied*, 127 S. Ct. (2006).[10] Moreover, courts and legislatures have

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[10] *See also People* v. *Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (statement to the director of a children's sexual assault center held nontestimonial); *In re S.L.G.*, 2007 WL 2609801, at *1, *4 (statement to advocate described as a "forensic interviewer" held nontestimonial).

broadened traditional hearsay exceptions for purposes of child sexual abuse and rape prosecutions far beyond what is permitted with regard to adults. *See generally* 2 Myers, ch. 7..

For example, a number of decisions apply the "excited utterance" exception to statements made by child witnesses days or even weeks after an alleged incident of sexual abuse, even though adult statements must generally be made immediately while still under the stress of the shocking event. *See, e.g., In re D.M.*, 822 N.E.2d 433, 437 (Ohio Ct. App. 2004) ("The excited-utterance hearsay exception is treated differently when the declarant is an alleged sexually abused child; the test is extremely liberal.").[11] Similarly, courts have relaxed various parameters of the "medical treatment" exception for child witnesses. *See, e.g., United States* v. *DeNoyer*, 811 F.2d 436, 438 (8th Cir. 1987) (overriding rule that statements regarding abuser's identity are inadmissible and emphasizing that "in cases involving young child witnesses, the administration of justice is served by the admission of statements made in a more relaxed environment without the possible harm of [a] traumatic courtroom encounter").[12] Many states have

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[11] *See also, e.g., State* v. *Thomas*, 460 S.E.2d 349, 353 (N.C. Ct. App. 1995) (holding that a statement made four .. five days after alleged abuse constituted an excited utterance, but ruling admission erroneous on other grounds); *State* v. *Huntington*, 575 N.W.2d 268, 273 (Wis. 1998) (emphasizing the "'compelling need'" for admission of hearsay in certain child sexual abuse cases and holding that statements made two weeks after alleged abuse constituted excited utterances (citation omitted)).

[12] *See also In re Personal Restraint Pet. of Grasso*, 84 P.3d 859, 868-869 (Wash. 2004) (children's statements to medical providers admissible without showing that the child understands the statements to be needed for treatment).

also enacted hearsay exceptions that are specifically designed to facilitate admission of out-of-court statements by child witnesses, particularly in sexual abuse and rape prosecutions. *See, e.g.*, La. Rev. Stat. Ann. § 15:440.2-4 (creating a hearsay exception for court-ordered videotaped statements by children who may have been witnesses or victims of crime).

These modifications to traditional evidentiary and procedural requirements represent a series of difficult policy choices made by courts and legislatures in favor of prosecuting child sexual abuse allegations. But whatever the balance struck on these issues as a matter of general social policy, these rules take on an added significance where child rape is treated as a death-eligible crime. Particularly when combined with the serious reliability issues raised by child testimony generally, the cumulative effect of these modifications is to reduce face-to-face confrontation and opportunities for effective cross-examination in cases involving child sexual abuse and rape. As this Court has previously acknowledged even in the non-death context, the "denial or significant diminution" of confrontation and cross-examination rights "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers*, 410 U.S. at 295 (citation omitted).

IV. Child Rape Cases, Therefore, Present Special And Unacceptable Risks Of Wrongful Execution

Far from satisfying this Court's demands for heightened "reliability in decisions involving death," *Spaziano* v. *Florida*, 468 U.S. 447, 456 (1984), child rape prosecutions pose heightened risks of wrongful execution. These reliability problems are comparable to the ones cited by this Court in *Roper* v. *Simmons* and *Atkins* v. *Virginia*, when it held that the Eighth Amend-

ment categorically forbids imposition of the death penalty in cases involving defendants under eighteen or with mental retardation, respectively. For instance, *Atkins* found a "special risk of wrongful execution" due to the fact that defendants with mental retardation "are typically poor witnesses" and may be prone to false confession. 536 U.S. at 321. And *Roper* concluded that the risks of wrongful execution were unacceptably high where even "trained psychiatrists with the advantage of clinical testing[,] observation [and] diagnostic expertise" could not reliably differentiate between juvenile offenders whose crimes reflected immaturity and those whose crimes were the product of antisocial personality disorder. 543 U.S. at 573.

While the risks in child rape cases derive from the particular characteristics of the victims/witnesses rather than of the defendants, a categorical ban against the death penalty is also warranted here in light of the unacceptable risks of wrongful conviction and execution. Furthermore, one of the perverse effects of the Louisiana sentencing regime is that admittedly guilty offenders have strong incentives to plead guilty quickly to avoid the death penalty, while defendants who steadfastly maintain their innocence must risk death to defend themselves at trial.[13] Although this criticism may be lodged against the death penalty in general, it is particularly troubling when, as has occurred in Louisiana,

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[13] For discussions of empirical evidence regarding plea bargaining and its effect on the arbitrariness of the death penalty, *see, e.g.*, Hoffman et al., *Plea Bargaining in the Shadow of Death*, 69 Fordham L. Rev. 2313, 2359-2360 (2001); Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2097-2098 (2000); O'Brien, *Capital Defense Lawyers: The Good, the Bad, and the Ugly*, 105 Mich. L. Rev. 1067, 1083-1084 (2007).

the only defendants who face the death penalty are those who refuse to accept a plea bargain to life imprisonment. *See* Pet. Br. 40. As a result, there is an intolerably high risk that Louisiana's sentencing regime will result in the execution of innocent defendants.

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

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Center on Wrongful Convictions

Pace Post-Conviction Project

Arizona Justice Project

Midwest Innocence Project

Innocence Project of Florida, Inc.

North Carolina Center on Actual Innocence

Wisconsin Innocence Project

Texas Innocence Network

Medill Innocence Project

Northern Arizona Justice Project

Innocence Project of New Orleans

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v.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

BRIEF OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, LOUISIANA CHAPTER; THE NATIONAL ALLIANCE TO END SEXUAL VIOLENCE; THE LOUISIANA FOUNDATION AGAINST SEXUAL ASSAULT; THE TEXAS ASSOCIATION AGAINST SEXUAL ASSAULT; THE NEW JERSEY COALITION AGAINST SEXUAL ASSAULT; AND THE MINNESOTA COALITION AGAINST SEXUAL ASSAULT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations of social workers and sexual assault crisis centers. They have substantial experience in treating child rape victims, helping their healing processes, and attempting to reduce the sexual exploitation of children. The *amici* thus have a strong interest in ensuring that sentencing schemes promote rather than hinder those goals.[1]

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world, with 145,000 members and 56 chapters throughout the United States and abroad (including the Louisiana chapter, which has 2,500 members). As part of its mission to improve the quality and effectiveness of social work practice—including with respect to the detection, treatment, and prevention of child sexual abuse—NASW promulgates professional standards and the *NASW Code of Ethics*, conducts research, provides continuing education, and advocates for sound public policies (including by filing *amicus* briefs in appropriate cases, before this Court and other courts). The NASW also supports the adoption of policies at the local, state, and national levels that promote assistance for victims of crime and ensure their safety and recovery from the

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[1] Pursuant to Supreme Court Rule 37.3, the parties have filed letters giving their blanket consent to the filing of *amicus* briefs in this case. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

crime, and supports research on the effects of crime on victims.

The National Alliance to End Sexual Violence (NAESV) is a national coalition of groups devoted to the rights of victims of sexual violence. The NAESV's Board of Directors consists of leaders of state sexual assault coalitions and national law, policy, and tribal experts who promote the NAESV's mission. The NAESV advocates on behalf of victims of sexual violence in support of efforts to create and improve services for victims and to combat sexual violence. In particular, it champions proposals that are grounded in research and that are assessed critically and routinely to ensure their effectiveness.

The Louisiana Foundation Against Sexual Assault (LAFASA) is a private nonprofit organization composed principally of Louisiana's sexual assault crisis centers. LAFASA provides a voice for victims of sexual assault; its activities include consulting with law enforcement, social workers, nurses, schools, and employers on sexual assault prevention, intervention, and investigation; coordinating the peer monitoring of its members' crisis centers; educating the public on sexual assault issues; and collaborating with state agencies and crime victims' groups on developing state and federal policies on sexual violence.

The Texas Association Against Sexual Assault (TAASA) is a private nonprofit organization of over 80 crisis centers in Texas. TAASA works to end sexual violence and to assist victims in obtaining healing and justice through community education, youth outreach, law enforcement training, and public policy advocacy. Because of the recent passage of a Texas statute that is similar to the Louisiana statute at issue here (The Jessica Lunsford Act, 2007 TEX. GEN.

LAWS ch. 593), TAASA has a particular interest in the outcome of this case.

The New Jersey Coalition Against Sexual Assault (NJCASA) consists of 22 sexual violence programs throughout New Jersey and individuals, students, and corporations concerned about ending sexual violence. Since its inception in 1981, NJCASA has been acting as an advocate for survivors and their loved ones statewide, while providing information and education to the public, media, and government officials regarding sexual violence issues. NJCASA is dedicated to developing and maintaining programs and services that support its mission of eliminating sexual violence and promoting the compassionate and just treatment of survivors and their loved ones.

The Minnesota Coalition Against Sexual Assault (MNCASA) is a private nonprofit organization of over 70 rape crisis centers in Minnesota and concerned citizens from across the state. MNCASA provides technical assistance and support to its member programs, educates the public on sexual violence, provides training and education, and advocates on behalf of sexual assault victims.

The *amici* have particular insight into the degree to which child rape is a terrible crime that greatly harms its victims. Accordingly, ending the scourge of sexual violence against children and aiding its victims are among the primary missions of the *amici*. Louisiana's aggravated rape law, LA. REV. STAT. § 14:42, undermines the *amici*'s shared goals of combating the sexual exploitation of children and facilitating the recovery of child victims. That statute provides that any act of oral-genital contact or anal or vaginal penetration of a child under the age of 13

years is a capital offense. *Id.* §§ 14:41–14:42. By permitting the execution of perpetrators of child sexual abuse, the statute will likely have exactly the wrong effect: rather than protecting children, it will increase the number of victimized children, encourage offenders to kill their victims, and hinder victims' healing process.

SUMMARY OF ARGUMENT

This Court has held that the death penalty for the offense of raping a 16-year-old woman violates the Eighth Amendment's prohibition of cruel and unusual punishment because such a penalty "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977). Louisiana's capital aggravated rape statute is, if anything, even worse than the statute at issue in *Coker*. The imposition of the death penalty for child rape affirmatively *harms* the very children whom it is intended to help. The Court therefore should invalidate the Louisiana statute in order to prevent those harms.

A. Executing child rapists will likely worsen the problem of underreporting that already frustrates efforts to combat sexual offenses against children. The overwhelming majority of sexual abuse is committed by victims' family members or close family friends. These relationships lead many victims—as well as family members who witness or suspect the abuse—to remain silent rather than to report the crime. For example, victims and other family members may fear the consequences of the abuser's prosecution and incarceration.

Louisiana's capital rape statute dramatically aggravates this problem. By magnifying the possible effects of a report of child rape, the Louisiana statute will likely ensure that fewer victims are identified and receive treatment—and that fewer abusers are stopped from continuing to abuse their victims and from victimizing even more children.

The increasing failure of the system to identify victims will produce a variety of harms for decades to come. Some harm will be immediate, in the form of continued abuse, while others will take years to manifest: beyond the rise in the number of victims per offender, many former abuse victims may face a host of long-term mental-health and substance-abuse problems because the abuse was allowed to continue.

B. Because Louisiana's penalty scheme does away with the marginal deterrence that is a central feature of punishment theory, the scheme will also encourage abusers to *kill* their victims. Under Louisiana law, abusers face no greater penalty for raping and killing their victims than for solely raping them; thus, it is more likely that an abuser will choose to eliminate the victim, who is in many instances the sole witness to the crime.

C. Even were Louisiana's penalty scheme to function as the legislature presumably hoped—*i.e.*, with abusers brought to trial and child victims testifying against them—Louisiana's law would greatly magnify the trauma that child victims already experience while participating in the criminal justice process. Even ordinary trials are highly traumatic for child victims; death-penalty trials, with their vastly increased publicity, expansive hearings, and multiplying pre-trial and post-conviction proceedings, will intensify that trauma by increasing the

scope and duration of the child victim's participation in the criminal justice system. Not only will this increased exposure hinder child victims' healing process, the imposition of a death sentence also will add to the guilt that child victims sometimes feel and may preclude the possibility of a future therapeutic meeting between the victim and his or her abuser.

D. Finally, the message sent to child victims by Louisiana's imposition of the death penalty on child rapists—that child rape is as terrible a crime as the worst murder—will impede victims' recovery. By equating the two crimes, child victims may come to believe that they, like murder victims, are irreparably harmed. That result would undermine victims' ability to heal.

ARGUMENT

The Court Should Eliminate The Death Penalty For Child Rape, A Penalty That Harms Abused Children Rather Than Helps Them.

In *Coker* v. *Georgia*, *supra*, this Court held that the Eighth Amendment to the United States Constitution forbids a state from executing the rapist of a 16-year-old woman because the penalty "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." 433 U.S. at 592. Louisiana's capital aggravated-rape statute is similarly wanton.

First, imposing the death penalty for child rape will reduce the likelihood that abuse will be reported and stopped, thus increasing the amount of abuse the victim suffers as well as the number of children whom each abuser can victimize. Second, by equalizing the penalties for child rape and murder, Louisi-

ana's statute encourages abusers to kill their victims. Third, when a case does go to trial under Louisiana's death penalty law, the trauma caused by the extensive trial process itself and the prolonged notoriety the case will generate will be even more severe and long-lasting, greatly hindering the healing process. Finally, imposing the same penalty for child rape as for murder will signal to child rape victims that society believes them to be as irreparably harmed as murder victims and thereby impede child victims' recovery. This Court should therefore reaffirm *Coker* and clarify that the Eighth Amendment precludes imposition of the death penalty for rape regardless of the victim's age.

A. Permitting the death penalty for child rape will worsen the problem of underreporting sexual abuse.

1. Child sexual abuse is disturbingly frequent. Estimates on the reported number of yearly victims range from about 83,000 to 217,000 children.[2] The actual number of victims is almost certainly much higher than even these numbers would suggest. In one of the most frequently cited articles on the prevalence of child sexual abuse, the author evaluated data from multiple retrospective surveys of adults and concluded that "there is considerable accumu-

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[2] See, *e.g.*, U.S. Department of Health and Human Services, *Child Maltreatment 2005* 41 tbl. 3-6 (2007) (estimating 83,810 reported incidents in 2005 by aggregating data from Child Protective Services reports); Andrea J. Sedlak & Diane D. Broadhurst, *Third National Incidence Study of Child Abuse and Neglect* 2-1 through 2-3, 3-3 tbl. 3-1 (1996) (estimating 217,700 victims in 1993 by canvassing more types of law enforcement agencies as well as reports from schools, day-care centers, and mental-health agencies).

lated evidence that at least 20% of American women and 5% to 10% of American men experienced some form of abuse as children." David Finkelhor, *Current Information on the Scope and Nature of Sexual Abuse*, 4 THE FUTURE OF CHILDREN 31, 42 (Summer/Fall 1994).[3] This evidence suggests that a relatively conservative estimate would be that 500,000 children are sexually abused in America each year. See *id.* at 34.

The overwhelming majority of these victims were abused by family members or others close to the family. Nearly 70 percent were abused by parental figures, family members, day-care providers, or a friend or neighbor. See U.S. Department of Health & Human Services, *supra*, at 59 tbl. 3-17. In one study of rapes of girls under the age of twelve, 96 percent of the victims reported that they knew the rapist.[4]

2. Research has shown that most victims "do not disclose their abuse to anyone." Gail E. Wyatt *et al.*, *The Prevalence and Circumstances of Child Sexual Abuse: Changes Across a Decade*, 23 CHILD ABUSE &

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[3] The number of male children who have been sexually abused may be even higher than this study suggests, because males may be "more reluctant to disclose abuse than girls" even years later. Tina B. Goodman-Brown *et al.*, *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse*, 27 CHILD ABUSE & NEGLECT 525, 527 (2003) (reviewing the literature and noting that, in retrospective studies of child sexual-abuse victims, men were less likely to have disclosed their abuse during childhood).

[4] See Patrick A. Langan & Caroline Wolf Harlow, U.S. Department of Justice, *Child Rape Victims, 1992* 2 (June 1994) (estimating that about 17,000 girls under age twelve were raped in 1992, with the father being the offender one-fifth of the time).

NEGLECT 45, 46 (1996) (collecting studies).[5] The reluctance to report sexual abuse is particularly high for abuse by family members.[6]

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[5] See also Rochelle F. Hanson *et al.*, *Factors Related to the Reporting of Childhood Rape*, 23 CHILD ABUSE & NEGLECT 559, 564 (1999) (reporting that 82.9 percent of female rape victims under the age of 18 did not disclose the abuse to the authorities); Daniel W. Smith *et al.*, *Delay in Disclosure of Childhood Rape: Results From a National Survey*, 24 CHILD ABUSE & NEGLECT 273, 278 (2000) (reporting that 9 percent of surveyed women had been raped as children and that 28 percent of those victims had never previously disclosed the abuse to anyone); Kamala London *et al.*, *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 PSYCHOL. PUB. POL'Y & L. 194, 201 (2005) (reporting that ten out of eleven retrospective studies "indicated that only one third of adults who suffered [child sexual abuse] revealed the abuse to anyone during childhood"); Kim English, *The Containment Approach to Managing Sex Offenders*, 34 SETON HALL L. REV. 1255, 1267 (2004) ("the ratio of arrest to self-reported (anonymous) sex crime was approximately 1:30 for those who engaged in rape and child molesting"); William Winslade *et al.*, *Castrating Pedophiles Convicted of Sex Offenses Against Children: New Treatment or Old Punishment?*, 51 SMU L. REV. 349, 363 (1998) ("child sexual abuse may be underreported by as much as eighty percent, meaning that only about twenty percent of the sexual abuse victims actually have their victimization reported").

[6] See, *e.g.*, Goodman-Brown *et al.*, 27 CHILD ABUSE & NEGLECT at 527, 537 (reporting that "[c]hildren whose abuse was intrafamilial took longer to disclose their abuse than did children whose abuse was extrafamilial" and that "children were least likely to disclose when the perpetrator was a natural parent, with 53% of these children never disclosing (the incest was discovered by accidental means)"); Smith, 24 CHILD ABUSE & NEGLECT at 279, 283 (finding that only 12 percent of child rape victims reported their assaults to authorities and that delayed disclosure was associated with a familial relationship); see also *id.* at 284–285 (reporting that "[r]apes perpetrated by strangers were much more likely to be disclosed to someone within 1

Victims are inhibited from coming forward out of shame, guilt, fear of being punished, and fear that the abuser will retaliate against the victim or other family members.[7] Victims also remain silent because they fear the consequences for the *abuser*, either out of confused loyalty or love or because the abuser has explained that "the family would become destitute should others learn of their behavior [and the abuser be arrested]." Gene G. Abel *et al.*, *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 INT'L J. L. & PSYCHIATRY 89, 99 (1984).[8] The intensity of the turmoil that victims experience in disclosing sexual abuse is so severe that, of the

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month than rapes by either family members or nonfamily acquaintances" and that "rape by a stranger was the best individual predictor of whether a child would tell someone else about her rape relatively quickly").

[7] See, *e.g.*, SETH L. GOLDSTEIN, THE SEXUAL EXPLOITATION OF CHILDREN: A PRACTICAL GUIDE TO ASSESSMENT, INVESTIGATION, AND INTERVENTION 54–67 (2d ed. 1999); Wyatt *et al.*, 23 CHILD ABUSE & NEGLECT at 46 (collecting studies and noting that some victims do not disclose abuse "due to perceptions that the reporting process will * * * hurt other people important to the survivor"); Goodman-Brown, 27 CHILD ABUSE & NEGLECT at 537 (noting the desire to protect family members other than the abuser and citing fears about how non-offending parents will react, as well as a sense of responsibility for the abuse).

[8] See also JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 18 (2005) (listing fear of harm to the abuser as among the "cogent reasons" for not reporting); Goodman-Brown, 27 CHILD ABUSE & NEGLECT at 528 ("Fear of negative consequences of disclosure may be particularly salient in cases of incest because children may fear their parent will be punished.") (citations omitted); Smith, 24 CHILD ABUSE & NEGLECT at 274 ("in cases of intrafamilial abuse victims often experience significant emotional conflict about making disclosures that implicate caretakers or other loved ones") (citation omitted).

victims who do come forward, a fifth or more can be expected falsely to recant. See Lindsay C. Malloy *et al.*, *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 162, 165 (Feb. 2007).

Other relatives also may be reluctant to disclose abuse for the same reasons that inhibit victims from coming forward: because of the family member's positive feelings for the abuser or because he or she fears the collateral consequences to the family if the abuse is disclosed.[9] Indeed, as states have enacted statutes mandating that health professionals report child abuse, the actual number of reports has declined, apparently because families decide not to go to professionals when they know that doing so will mean that the abuse will be reported to authorities.[10]

3. In the considered view of *amici*, the threat of capital punishment for sexual abusers of children will greatly amplify the concerns that already prevent many victims and relatives from reporting abuse. Victims who love their abusers may be all the more reluctant to report abuse to police when the

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[9] See STEPHEN T. HOLMES & RONALD M. HOLMES, SEX CRIMES 86 (2d ed. 2002) (noting that a dependent spouse may not report abuse because of the stigma and economic consequences of her partner's incarceration); DOUGLAS J. BESHAROV, RECOGNIZING CHILD ABUSE 94 (1990) ("Conscious denial [of abuse] is often related to a parent's fear of family disintegration, legal consequences or the reaction of the other spouse."); Abel *et al.*, 7 INT'L J. L. & PSYCHIATRY at 99 (noting that some feared repercussions may actually occur).

[10] F.S. Berlin *et al.*, *Effects of Statutes Requiring Psychiatrists to Report Suspected Sexual Abuse of Children*, 148 AM. J. PSYCHIATRY 449 (1991).

possible consequences include lethal injection.[11] The reluctance may also be a product of the victim's own sense of responsibility for the abuse.[12]

Likewise, a non-offending family member, already facing "a difficult decision," HOLMES & HOLMES, *supra*, at 86, will face an even harder choice. The stigma of a possible death-penalty prosecution of a relative and its attendant publicity—as well as their feelings for the abuser—can only feed the fears that already inhibit non-offending family members from coming forward. Instead of encouraging the best-positioned witnesses—the victim and other family members—to report abuse, Louisiana's law will reinforce the internal constraints that many victims and their family members already feel.

4. The experience of the *amici* in encouraging child victims and their families to report abuse and to cooperate with the criminal justice process confirms the social science research. Victims and their relatives often are extremely reluctant to come forward because of the consequences of doing so that the criminal justice system creates.

Given the novelty of capital prosecutions for child rape, there is little secondary literature that directly assesses the impact these prosecutions will have on

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[11] Cf. ANNA C. SALTER, TREATING CHILD SEX OFFENDERS AND VICTIMS: A PRACTICAL GUIDE 216 (1988) (noting, in the context of treating victims, that "[p]articularly in incest cases, where the child may be very attached to the father, fear of loss may take precedence over the anger").

[12] See Goodman-Brown, 27 CHILD ABUSE & NEGLECT at 528 (noting that many sexually abused children "come to believe that they are at least partially responsible for their own abuse").

the rate of reporting by victims. But the *amici*'s collective experience in working with child victims and their family members leads them firmly to conclude that the mere threat of a possible death sentence for child rape will dramatically worsen the already-severe problem of underreporting that currently hinders the *amici*'s efforts in combating the sexual abuse of children.

5. Fewer reports by victims and family members will cause victims to endure continued abuse that otherwise would have been averted, with increasingly severe consequences.[13] The wounds caused by child abuse are deep, but intervention and treatment, if obtained, can help the healing process.[14] By contrast, the treatment prognosis for children who suffer from prolonged sexual abuse is much more bleak. For example, continued abuse increases the likelihood that the victim will subsequently engage in crime, become pregnant while a minor, drop out of school, abuse alcohol or drugs, and suffer from psychological disorders such as depression, anxiety disorders, and post-traumatic stress disorder.[15]

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[13] See GOLDSTEIN, *supra*, at 70; Abel *et al.*, 7 INT'L J. L. & PSYCHIATRY at 93.

[14] See SALTER, *supra*, at 248 ("In cases in which there is no intervention, the powerlessness of the victim often continues even after the abuse itself has stopped.").

[15] See Barbara Tatem Kelly, U.S. Department of Justice, *In the Wake of Childhood Maltreatment* 2 (Aug. 1997); Paula K. Lundberg-Love, *The Resilience Of The Human Psyche: Recognition And Treatment Of The Adult Survivor Of Incest*, *in* THE PSYCHOLOGY OF SEXUAL VICTIMIZATION: A HANDBOOK 5–8 (Michele Antoinette Paludi ed., 1999). See also Jill Goldman *et al.*, U.S. Department of Health and Human Services, *A Coordinated Response to Child Abuse and Neglect: The Foundation for Prac-*

Notably, the damage caused by Louisiana's statute will not be limited to the abusers' current victims. "Sex offenders who are not arrested, convicted, and sent to prison remain free to commit more sex crimes." LA FOND, *supra*, at 32; see also HOLMES & HOLMES, *supra*, at 89. Rates of recidivism are lower than popular perception would have it, but they are still significant: one study found that 10 percent of child molesters offend again within 4 to 5 years, and other studies have found that recidivism rates grow higher when the time span is extended.[16]

6. Nor will these effects remain confined to Louisiana's borders. Laypersons in other states, who may not comprehend the finer points of our federal system, may be deterred from reporting child sexual assaults based on the conclusion that the doubtless-well-publicized execution of Patrick Kennedy means that any state (perhaps their own) can impose the same penalties for the same conduct. Moreover, offenders in Louisiana who will go undetected may commit offenses in other states. Finally, the increasing number of victims means that more former abuse victims will ultimately leave the state, carrying with them the burdens worsened by Louisiana's law.

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tice 36 (2003) (in reaction to "persistent stress associated with ongoing maltreatment, the child's brain may strengthen the pathways among neurons that are involved in the fear response. As a result, the brain may become 'wired' to experience the world as being hostile and uncaring.").

[16] See R. Karl Hanson, *Who is Dangerous and When are they Safe? Risk Assessment with Sexual Offenders*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 64–65 (Bruce J. Winick and John Q. La Fond eds., 2003).

Accordingly, the Court should invalidate Louisiana's capital-punishment scheme, which will otherwise exacerbate the underreporting problem, causing extremely harmful ripple effects that will linger for decades.

B. Allowing Louisiana to execute child rapists will increase the incentives that child molesters have to kill their victims.

By tying the level of punishment to the severity of the crime, criminal law seeks to reduce the severity of criminal activity.[17] Imposing the death penalty for child rape upsets this basic tenet of penalty schemes—marginal deterrence—with potentially devastating effects nationwide.

If the death penalty is reserved for murder, then sex offenders have an incentive to stop short of killing their victims. By imposing the death penalty for child rape, Louisiana's statute dangerously realigns sex offenders' incentives. If an offender believes that he will be sentenced to death if convicted of either raping a child or both raping and murdering that child, the offender will have every incentive to kill his victim and thus eliminate the primary witness to the crime.[18] The offender will, as a result, also be

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[17] See, *e.g.*, *United States* v. *Beier*, 490 F.3d 572, 575 (7th Cir. 2007) ("the concept of marginal deterrence * * * is that punishing two crimes of different gravity the same is unsound"); see also STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 518–19 (2004); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 178 (1789); CESARE BECCARIA, ON CRIMES AND PUNISHMENTS, AND OTHER WRITINGS 21 (Richard Bellamy ed., 1995) (1767).

[18] See, *e.g.*, Corey Rayburn, *Better Dead Than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S

more likely to remain free to abuse additional children, in Louisiana and elsewhere.[19]

Moreover, abusers who are not known by their victims will have the strongest incentives to kill.[20] Because these cases are the ones in which child victims are most likely to report the abuse, the Louisiana law eliminates the increase in penalty that may have dissuaded some stranger perpetrators from killing—and thus silencing—their victims. Thus, not only does the Louisiana statute inhibit reporting in the majority of child sexual assaults, which are committed by family members or acquaintances, see Part A, *supra*; the scheme also encourages stranger perpetrators to kill their victims. The perverse consequence of this is to reduce the likelihood that the offender will be apprehended and that the victim will survive and receive treatment.

L. REV. 1119, 1159 (2004) ("If murder does not incur additional punishment, then the motivation to kill the primary witness to the crime is strong.").

[19] Indeed, even child molesters in states that do not impose the death penalty may decide to kill their victims in response to news reports about Louisiana's punishment scheme.

[20] Studies show that these abusers are already the most likely to kill their victims. See Lawrence A. Greenfeld, U.S. Department of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* 30 (Feb. 1997) (reporting that "[s]exual assault murders were about twice as likely as all murders * * * to involve victims and offenders who were strangers").

C. The Louisiana statute will greatly magnify the trauma that child victims already experience while participating in the criminal justice process.

It is well established that sexually abused children find the criminal justice process to be highly traumatic. Although Louisiana's death penalty law may reduce the number of child rape trials, that reduction will be more than offset by the greatly increased trauma that child victims will suffer in all cases—and especially in those in which trials do occur.

1. As a general matter, court proceedings increase and extend the harm suffered by the abused children:

> In the midst of * * * vulnerability [following disclosure of abuse], the criminal justice, health, and social service systems may descend upon a child and family with such a devastating impact that its recipients are left with the feeling that the "cure" is far worse than the symptoms.

Kee MacFarlane, *Sexual Abuse of Children*, *in* THE VICTIMIZATION OF WOMEN 81, 97 (Jane Roberts Chapman & Margaret Gates eds., 1978). Indeed, some experts conclude that "children are often *more* traumatized by the court proceedings than by the sexual abuse." KAREN L. KINNEAR, CHILDHOOD SEXUAL ABUSE 26 (2d ed. 2007) (emphasis added).[21]

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[21] See also Roger J.R. Levesque, *Prosecuting Sex Crimes Against Children: Time for "Outrageous" Proposals?*, 19 L. & PSYCHOL. REV. 59, 82 (1995) ("The best data shows that the likelihood that intervention, under the current system, may fail

Perhaps the most comprehensive study to have examined the effects of testifying on abused children was conducted by Gail S. Goodman. She found that child victims find testifying in criminal court to be traumatic, not cathartic. See GAIL S. GOODMAN *et al.*, TESTIFYING IN CRIMINAL COURT 50 (1992).[22] Moreover, repeated courtroom testimony especially hinders healing. See *id.* at 51.

Goodman and other researchers recently updated her original study and interviewed about 80 percent of that study's participants. They found that, ten years later, having testified at trial was strongly associated with "negative outcomes" even "years after the legal cases ha[d] ended." JODI A. QUAS *et al.*, CHILDHOOD SEXUAL ASSAULT VICTIMS: LONG-TERM OUTCOMES AFTER TESTIFYING IN CRIMINAL COURT 72 (2005). Moreover, having testified repeatedly, which had been the "strongest" predictor of mental-health trauma in the short term, also was "associated with poorer later mental health, including more trauma-related symptoms"—even "for individuals who had improved in the short term." *Ibid.* The authors concluded that "testifying in the adversarial system appears to be a salient feature in and of itself with direct implications for negative outcomes, including years after legal cases have ended." *Ibid.*

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or even harm the child victim is greater than we wish to acknowledge."); English, 34 SETON HALL L. REV. 1258 ("Clinicians have often observed that the harm of some sexual abuse experiences lies less in the actual sexual contact than in the process of disclosure or even in the process of intervention.") (internal quotation marks omitted).

[22] This Court cited an earlier version of this study in *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (noting the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court").

2. These findings strongly suggest that Louisiana's penalty scheme will impede victims' healing process. Based on their experience with child rape victims, *amici* firmly believe that the availability of the death penalty will substantially magnify the traumatic nature of the judicial process.

First, the introduction of the death penalty will likely increase the extent and duration of the victim's exposure to the trial process. Capital cases tend to feature more and lengthier pretrial proceedings than non-capital cases and take much longer to bring to trial. In fact, a recent study found that capital rape cases in Louisiana averaged 633 days from arrest to disposition, whereas non-capital rape cases averaged less than half as long—283 days.[23] The death penalty process itself also necessitates bifurcated trials, see *Gregg* v. *Georgia*, 428 U.S. 153, 195 (1976), which by definition last longer than non-capital trials and at each stage of which the victim may be required to testify.

In addition to producing more court proceedings requiring the victim's attendance or participation, the intensity of that participation also may increase. Capital defendants likely will seek to chip away at the protections that child abuse victims traditionally have enjoyed in court. Abusers on trial may argue, for example, that victims must testify and be subject to cross-examination in open court because "the acute need for reliable decisionmaking when the death penalty is at issue" (*Deck* v. *Missouri*, 544 U.S. 622, 632 (2005) (internal quotation marks omitted))

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[23] See Angela D. West, *Death as Deterrent or Prosecutorial Tool? Examining the Impact of Louisiana's Child Rape Law*, 13 CRIM. JUST. POL'Y REV. 156, 183 (2002).

tilts the constitutional balance in favor of an abuser's "right to face his or her accusers in court" and against the "State's interest in the physical and psychological well-being of child abuse victims." *Craig*, 497 U.S. at 853; see also *ibid.* (noting that only "in some cases" would the State's interest in protecting the child witness "outweigh" the defendant's Confrontation Clause rights). Defendants also may urge states once again to require child victims' testimony to be corroborated or promptly reported to be admissible, thereby turning back the clock to the days when the law treated victims of sex crimes with deep suspicion. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945 (2004).

The fact that the case could result in the execution of the defendant also will heighten the distress felt by a testifying child victim, who in many cases may suffer tremendous guilt and remain emotionally attached to the perpetrator. One of the findings of the updated Goodman study is that the greater the distress of the victim while testifying—recorded by researchers using measures such as how emotional the child was on the witness stand—the poorer his or her adjustment ten or more years later.[24]

Thus, one therapist recounts her first-hand observation of the effects of putting victims on the witness stand:

> [I] will never forget the look on the face of a 9-year-old incest victim when her father was

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[24] See QUAS, *supra*, at 102 (concluding that "[f]eeling more negative about having to testify * * * was associated with higher levels of" multiple measures of adverse mental health).

> brought into the courtroom with chains and handcuffs around his hands and waist. * * * Her only comment before she withdrew into a spasmodic, twitching episode * * * was, "I did *that* to my Daddy?"

MacFarlane, *Sexual Abuse of Children*, *supra*, at 99 (emphasis in original). Because testifying against a parent or other loved one with the knowledge that death may follow conviction will assuredly make the experience even more distressing for the child, victims are more likely to experience intense and lasting negative effects.[25] Indeed, the Louisiana Supreme Court noted that, when the victim in this case was on the stand, she wept repeatedly and at length—including one interlude of at least 23 minutes. See Pet. App. 16a.

Moreover, the added publicity from a death-penalty prosecution may alone be sufficient to increase the trauma experienced by a victim for at least two reasons. First, more public attention will be focused on the victim, making his or her interactions with the criminal justice process more traumatic. As Chief Justice Burger observed in *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982), "having to relate the details of the crime in front of a crowd which inevitably will include voyeuristic strangers," and which "may be expanded to include a live television audience, with reruns on the evening news," may be a "devastating" experience for a child victim

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[25] See QUAS, *supra*, at 102 (noting that older children's greater awareness of legal consequences "probably contribute[s] to their increased distress both in anticipation of and while actually testifying").

of a sex crime, "leav[ing] permanent scars." *Id.* at 618 (Burger, C.J., dissenting).

Second, even aside from the added attention on the victim, "negative consequences for the child are more likely to result" from the increased notoriety of a death penalty case. Abel, 7 INT'L J. L. & PSYCHIATRY at 93. The secondary literature studying the effects of media accounts on child pornography victims confirms *amici*'s experience in this regard. Researchers have found that victims of child pornography suffer greater trauma with increased circulation of the pornographic materials. See, *e.g.*, T. Christopher Donnelly, Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J. LAW REFORM 295, 301 (1979) ("The victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child."); see also *New York* v. *Ferber*, 458 U.S. 747, 759 (1982) ("the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation").

In addition, the extended appeals process that inevitably follows a death sentence will draw out the trauma and substantially hinder the healing process. The original Goodman study found that "by the time the cases were resolved, the behavioral adjustment of most, but not all children who testified was similar to that of children who did not take the stand." GOODMAN, *supra*, at 114–115. While subsequent work reveals a more lasting impact, and the study did not and could not examine the effects of drawn-out death penalty appeals, Louisiana's scheme will necessarily mean that those cases resulting in death sentences will not be "resolved" for many years. As of

2006, the length of time between sentencing and execution averaged over 12 years. Tracy L. Snell, U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 2006*, at tbl. 11 (Dec. 2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/tables/cp06st11.htm. During this period, not only would the publicity accompanying each stage of the appellate process dredge up traumatic memories for the victims, but the high reversal rate in capital cases[26] would subject many victims to one or more retrials at which they would again relive the abuse. This lack of closure almost certainly will hamper the healing process.

Furthermore, the trauma of the eventual execution itself—and the enormous publicity attendant to such an execution—almost invariably will impede the victim's recovery. Cf. LA FOND, *supra*, at 25 (noting that triggering events may push "horrible memories of the crime" to the fore). In poet Maya Angelou's memoir, *I Know Why the Caged Bird Sings*, she describes her own reaction, at the age of eight, to the news that her rapist—her mother's boyfriend—had been killed. While testifying in court, Angelou had denied, falsely, that the man had ever touched her before the day he raped her. MAYA ANGELOU, I KNOW WHY THE CAGED BIRD SINGS 84–85 (1970). Her lie was motivated by her sense of guilt at having participated in the abuse or enjoyed the closeness and affection that followed it. *Ibid.* When she learned that the man had been killed, she blamed herself:

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[26] See, *e.g.*, James S. Liebman *et al.*, *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000) (68 percent reversal rate).

> Obviously I had forfeited my place in heaven forever, and I was as gutless as the doll I had ripped to pieces ages ago. Even Christ Himself turned his back on Satan. Wouldn't He turn His back on me? I could feel the evilness flowing through my body and waiting, pent up, to rush off my tongue if I tried to open my mouth. I clamped my teeth shut, I'd hold it in. If it escaped, wouldn't it flood the world and all the innocent people?

Id. at 86–87. Angelou did not speak to anyone but her brother for more than a year. *Id.* at 87–100.

Aside from the trauma directly caused by the offender's execution, the fact that the abuser is executed precludes the possibility of future healing through a structured visit, which provides the victim with the opportunity to confront his or her abuser. The Louisiana Department of Public Safety and Corrections maintains a Victim/Offender Dialogue program for the benefit of victims,[27] but an executed offender obviously could not participate in this process.

There can be little or no doubt that Louisiana's statute will, perversely, increase the trauma suffered by the victims of child rape.

D. Imposing the death penalty for child rape would equate the severity of that crime with the most egregious murders, thus impeding victims' recovery.

The message conveyed by the Louisiana statute is also, in itself, harmful to victims. This Court has

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[27] See Louisiana Department of Public Safety and Corrections, Victims Services, *at* http://www.doc.louisiana.gov/Victim%20Services/victim_services.htm.

repeatedly stated that the death penalty "must be reserved for the 'worst of the worst.'" *Kansas* v. *Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 2543 (2006) (Souter, J., dissenting); see also *Roper* v. *Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.") (internal quotation marks omitted); *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002) ("[O]ur jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes."). The only group of offenders that this Court has ever held to constitute the "worst of the worst" is murderers whose crimes reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Godfrey* v. *Georgia*, 446 U.S. 420, 433 (1980); see also, *e.g.*, *Enmund* v. *Florida*, 458 U.S. 782, 797 (1982) (disallowing the death penalty in a felony-murder case in which the defendant intended only that a robbery, not a murder, occur because robbery "does not compare with murder, which does involve the unjustified taking of human life") (internal quotation marks omitted).

The message that the Louisiana statute sends to child rape victims is that they are akin to murder victims—that is, that they are irreparably harmed and that their lives are effectively over:

> The most pernicious and insidious message conveyed by comparisons [of rape] to death is that those who have been raped have no reason to live. If it is true that those who have had to experience the ordeal of being raped have suffered a 'fate worse than death' that will haunt them for the rest of their lives,

> then what reason do they have to continue living? If death is truly the lesser of two evils, why would someone hesitate to embrace it as an escape from the horrific experience of rape?

Rayburn, 78 ST. JOHN'S L. REV. at 1153–1154.

This message is perilous for the recovery of child victims, who will be increasingly inclined to view their rape as an insurmountable obstacle to a return to normalcy. Children who have already suffered the brutal trauma of rape must not be victimized yet again by a system that claims to have their best interests at heart.

* * * * *

The consequences of the Louisiana statute authorizing the death penalty for child rape are perverse—almost certainly increasing the amount of child sexual abuse, placing the victims of child abuse at greater risk of murder, and increasing the trauma that such victims suffer. This Court should invalidate the Louisiana statute to protect the victims of child rape and to clarify that, despite the heinous nature of this crime, the Eighth Amendment forbids the execution of child rapists.

CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

15

3-19-08

Nos. 07-343

In the Supreme Court of the United States

PATRICK KENNEDY,
Petitioner,

v.

LOUISIANA,
Respondent.

On Writ of Certiorari to the
to the Louisiana Supreme Court

BRIEF OF TEXAS, ALABAMA, COLORADO, IDAHO, MISSISSIPPI, MISSOURI, OKLAHOMA, SOUTH CAROLINA, AND WASHINGTON AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether imposing the death sentence on an adult male who brutally rapes his eight-year-old stepdaughter is a disproportionate punishment that violates the Eighth Amendment.

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INTEREST OF *AMICI CURIAE*

The *amici* States have a vital interest in imposing the death sentence upon those persons who commit heinous and depraved capital crimes, especially upon those offenders who prey upon the most innocent and vulnerable members of society—children. Concerning the rape of an adult woman, the Court has observed that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'" *Coker* v. *Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion); *see id.*, at 612 (Burger, C.J., dissenting) (same). Rape victims can suffer grievous physical or psychological injuries, *id.*, at 603 (Powell, J., concurring), and inevitably endure "a gross assault on the human personality," *id.*, at 612 (Burger, C.J., dissenting).

These harms apply with even greater force to the rape of a prepubescent child, as at issue here.

The *amici* States urge the Court to reject the entreaty of Petitioner and his *amici* to impose a categorical Eighth Amendment ban on the application of the death penalty in cases of nonhomicide aggravated child rape. Enacting a categorical ban, irrespective of the will of the people as expressed through their States' legislative enactments, would be "antithetical to considerations of federalism," and would "cut off . . . normal democratic processes," *Atkins* v. *Virginia*, 536 U.S. 304, 322, 323 (2002) (Rehnquist, C.J., dissenting). The *amici* States seek to preserve the ability of their democratically elected legislatures to enact penal laws that are reflective of the contemporary moral judgment of society concerning the unique and horrific crime of aggravated child rape.

SUMMARY OF ARGUMENT

Patrick Kennedy committed an unspeakable crime. He savagely raped his eight-year-old stepdaughter, leaving her bleeding and badly injured in her own bed. A recidivist child rapist, this was the second time he had brutally raped a little girl.

Thirty one years ago, the Court concluded that the Constitution does not allow the imposition of the death penalty for adult rape. Fourteen times in the course of that opinion, the Court carefully cabined the reach of that decision to adult rape, anticipating and implicitly reserving the issue in this case.

This Court's precedents have long spoken of evolving standards of decency. Such evolution need not be in only one direction.

Indeed, one of the most important evolutions of modern times has been the growing understanding and appreciation of the singular horror that is child rape. Child sexual abuse occurs with saddening frequency, and the deviant desires of pedophiles have proved markedly difficult to combat.

And yet, aggravated child rape is even worse. It is an irreparable crime, one that inflicts permanent, grievous harm on the heart, mind, and soul of a young child. Tragically, the children raped by Patrick Kennedy will feel the pain of his crime every day of their lives.

Violent child rape is unique. No other crime inflicts comparable damage. And no other crime requires the peculiar depravity manifested by those who rape small children. The pitiless infliction of permanent lifelong suffering upon a young child reflects a degree of

culpability, a degree of manifest evil, that is qualitatively distinct.

Reflecting society's growing understanding of the nature and consequences of violent child rape, six different States, in recent years, have enacted laws subjecting the worst such offenders to the death penalty. The direction of that legislative change is uniform. And several more States are now considering similar legislation.

Those laws evince the broader understanding of modern society, informed by medicine and social science, that violent child rape is a crime unlike any other. Consonant with these evolving conceptions of decency, the Court should conclude that the Constitution allows democratically elected legislatures to choose the most severe punishment for the most heinous child rapists.

ARGUMENT

I. APPLICATION OF THE DEATH PENALTY IN THIS CASE DOES NOT OFFEND THE CORE PRINCIPLES OF THE EIGHTH AMENDMENT.

Patrick Kennedy was indicted, tried, convicted, and sentenced to death for the aggravated rape of an eight-year-old female child, L.H. *State* v. *Kennedy*, 957 So.2d 757, 760 (La. 2007). The Eighth Amendment's proscription of cruel and unusual punishment stands as no barrier to his death sentence.

The Eighth Amendment, applicable to the States via the Fourteenth Amendment, *Robinson* v. *California*, 370 U.S. 660, 667 (1962), provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. This prohibition prevents the imposition of inhumane and

barbarous executions. *Gregg* v. *Georgia*, 428 U.S. 153, 170 (1976) (opinion of Stewart, Powell & Stevens, JJ.); *see In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death.").

The irreducible minimum of the Eighth Amendment's injunction is that punishments must not be an affront to "human dignity." *Trop* v. *Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion); *see also Atkins*, 536 U.S., at 311; *Gregg*, 428 U.S., at 173, 182 (opinion of Stewart, Powell, & Stevens, JJ.); *Furman* v. *Georgia*, 408 U.S. 238, 270 (1972) (opinion of Brennan, J.).

Petitioner's death sentence comports with these core principles. Petitioner and his *amici* urge that the death penalty can never be applied to child rapists like himself because it is a *per se* disproportionate punishment for the crime of aggravated child rape. That claim does not flow from this Court's precedents.

II. The Eighth Amendment Does Not Require a Categorical Ban of the Death Penalty in All Cases of Nonhomicide Aggravated Rape of a Child.

The Court has held "that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." *Gregg*, 428 U.S., at 187 (opinion of Stewart, Powell & Stevens, JJ.); *see also id.*, at 226 (White, J., concurring) ("[N]either can I agree with the petitioner's other basic argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment."); *id.*, at 226-27 (statement of Burger, C.J., & Rehnquist, J.) (concurring in

judgment and joining opinion of White, J.); *id.*, at 227 (Blackmun, J., concurring); *Coker*, 433 U.S., at 591 ("It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment . . . .") (plurality opinion).

It is well settled that the death penalty may be an appropriate punishment under the Eighth Amendment in the proper circumstances. The Court has never definitively set forth a list of those crimes for which the death penalty passes constitutional muster. Nonetheless, Petitioner and his *amici* argue that the Court, in *Coker* v. *Georgia*, 433 U.S., at 584, effectively banned the death penalty in every type of *nonhomicide* case.

Specifically, they argue that "the Louisiana Supreme Court's decision allowing the imposition of capital punishment for the crime of child rape cannot be squared with *Coker*" and that "[t]he *Coker* Court considered all legislative variations of rape and forbade capital punishment for that offense for the simple reason that the crime 'does not take [a] human life.'" Pet. at 13. Petitioner's implicit claim, however, that *Coker* created a constitutional rule requiring a death-of-the-victim litmus test for imposing the death penalty is unfounded.

Death of the victim neither is nor should be the absolute litmus test for imposing the death sentence for three reasons. First, the scope of the *Coker* plurality opinion is not so broad as Petitioner suggests. Second, a death-of-the-victim test would be contrary to the Eighth Amendment precept that death-penalty cases must be evaluated according to evolving standards of decency. And, third, the logic of that test would reach beyond all rape cases and potentially thwart legislatures' ability to

reflect society's present moral judgment concerning the propriety of imposing the death penalty in several other types of nonhomicide crimes that the Court never expressly considered, much less invalidated, in *Coker*.

A. The *Coker* Plurality Carefully Limited Its Holding To Avoid Imposing a Categorical Ban of the Death Sentence in All Cases of Nonhomicide Rape.

Coker did not decree a categorical ban of the death sentence for nonhomicide rape. To the contrary, the *Coker* plurality took great pains in carefully cabining its holding. The plurality repeatedly couched its analysis in terms of the narrower situation involving the rape of an "adult woman," as opposed to all rape victims. The plurality used the phrase "rape of an adult woman" no less than 14 times in its opinion. *Kennedy*, 957 So.2d, at 781; Melissa Meister, Note, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197, 202 (2003).

Even more telling is how the issue was framed in *Coker*. After noticing that the Court in *Gregg* had "reserved the question of the constitutionality of the death penalty when imposed for . . . crimes [other than 'deliberate murder']," the plurality stated: "That question, *with respect to rape of an adult woman*, is now before us." *Coker*, 433 U.S., at 592 (emphasis added). Justice Powell, concurring in the judgment of the Court, apparently believed that the plurality's opinion was carefully circumscribed because he wrote: "I concur in the judgment of the Court *on the facts of this case*, and also in the plurality's reasoning supporting the view that ordinarily death is disproportionate punishment for the crime of

raping an adult woman." *Id.*, at 601 (emphasis added). Thus, under the terms of the opinions that issued, a majority of the Justices in *Coker* did not conclude that the Eighth Amendment prohibits the death penalty in all nonhomicide cases of rape.

B. A Categorical Ban of the Death Penalty in All Cases of Rape Is Contrary to the Court's Well-Established "Evolving Standards of Decency" Test.

A constitutional rule that the death penalty has already been definitively decided to constitute cruel and unusual punishment in a nonhomicide case would also be contrary to the concept of "evolving standards of decency" first announced in *Trop* v. *Dulles*. The "evolving standards of decency" benchmark "is not a static command," *Roper* v. *Simmons*, 543 U.S. 551, 589 (2005) (O'Connor, J., dissenting); rather, it is interpreted "in a flexible and dynamic manner," *Stanford* v. *Kentucky*, 492 U.S. 361, 369 (1989) (quoting *Gregg*, 428 U.S., at 171 (opinion of Stewart, Powell, & Stevens, JJ.)). It asks whether capital punishment for the crime being tried "is morally unacceptable to the people of the United States *at this time* in their history," *Furman*, 408 U.S., at 360 (opinion of Marshall, J.) (emphasis added). Interpreting *Coker* to have settled the constitutionality of the death penalty for *all* nonhomicide rapes (especially given the narrow issue before the Court at that time) would unnecessarily ossify death-penalty jurisprudence and frustrate society's ability to express its current moral judgment through legislation.

Moreover, the "evolving standards of decency" framework is not a one-way street that may lead only towards the elimination of the death penalty. Rather, "'evolving standards' may also support an expansion of the

punishment as society learns more about the nature of crime." Ashley M. Kearns, *South Carolina's Evolving Standards of Decency: Capital Child Rape Statute Provides a Reminder That Societal Progression Continues Through Action, Not Idleness*, 58 S.C. L. REV. 509, 526 (2007). Under the Court's "dynamic and flexible" approach to "evolving standards of decency," there still is room for the interpretation that, as the prolonged effects of child rape have become better known and society has become ever more aware of the harm to children and of the recidivism and depravity of the worst child sex offenders, societal standards have progressed to the point where capital punishment is recognized as proportional for the crime of child rape. *See id.*, at 527. Each State's legislature should be allowed the flexibility to adopt capital-sentencing laws that reflect its citizens' current moral judgment regarding the just deserts for certain capital crimes. *Coker*, 433 U.S., at 615 (Burger, C.J., dissenting); *see also Harmelin* v. *Michigan*, 501 U.S. 957, 989-90 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.) (noting that a State may choose to impose a penalty or even a reward for the same conduct that another State imposes a different penalty); *cf. New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Indeed, in Texas, for example, the Legislature has this past year enacted legislation that permits the death sentence in cases involving repeat sex crimes against

young children. *See* Jessica Lunsford Act, 80th Leg., R.S., ch.593, §1.15, 2007 Tex. Gen. Laws 1120, 1125-26 (codified at TEX. PENAL CODE §12.42(c)). The legislation is "Texas's version of Jessica's Laws, the name given to a set of proposed laws targeting sex criminals with child victims and to a national movement to implement those laws in every state." House Research Org., Bill Analysis, Tex. H.B. 8, 80th Leg., R.S., at 5-6 (2007), *available at* http://www.hro.house.state.tx.us/hrodocs/ba80r/hb0008.pdf [hereinafter H.R.O., Bill Analysis]. It was "named for Jessica Lunsford, a nine-year-old girl who was kidnapped, sexually assaulted, and murdered in 2005" in Florida by a registered sex offender who was convicted of Jessica's killing and sentenced to death. *Id.*, at 6; FoxNews.com, *Judge Sentences John Couey to Death for Murdering Jessica Lunsford*, Aug. 24, 2007, *at* http://www.foxnews.com/story/0,2933,294371,00.html.

Supporters of the Texas legislation believed that (1) "[s]ex offenses against children are so horrific that the death penalty for repeat offenders would be appropriate and just punishment"; (2) "Texas should protect children by authorizing the most severe penalty for people who repeatedly commit violent sex crimes against them"; (3) "long prison sentences[] [were] not adequate to address the harm offenders have caused and the danger to the community they represent"; and (4) "[c]oncerns that making serious sex crimes against children eligible for the death penalty would prompt offenders to kill victims [were] unfounded" because "[o]ther states with similar laws ha[d] seen no rash of child killings." H.R.O., Bill Analysis, at 6.

The Texas Legislature decided to enact the legislation and join at least five other States—Florida, Louisiana,

Montana, Oklahoma, and South Carolina—in authorizing the death penalty for people who commit repeat sex crimes against children. *Id.* In doing so, the Legislature believed that it was "far from certain" that *Coker* applied to cases involving "repeat child rapists." *Id.*, at 7.

Texas's experience illustrates well the progression in the "evolving standards" approach that this Court has explained animates the proportionality inquiry under the Eighth Amendment. The State of Texas, and other States like it,[1] should be permitted the leeway to decide for themselves and their citizens what constitutes appropriate and proportionate punishment, in keeping with the constitutional prohibition against inhumane and torturous punishments, for the crime of nonhomicide child rape.

C. A Categorical Ban of the Death Sentence in All Cases of Nonhomicide Rape Would Effectively Overturn Many Statutes That Permit the Death Sentence in Nonhomicide Cases Other Than Rape.

Furthermore, taken to its logical end, Petitioner's argument would forbid the imposition of the death penalty for any type of nonhomicide crime. Such a sweeping conclusion, however, is not consistent with the history of the death penalty and society's current moral judgment reflected in modern legislative enactments. Both Congress and state legislatures have repeatedly enacted statutes that permit the imposition of the death penalty for

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1. Currently, the States of Alabama, Colorado, Mississippi, Missouri, and Tennessee are considering similar legislation. *See* Ala. H.B. 456, Leg., R.S. (2008); Colo. S.B. 08-195, 66th Gen. Assembly, 2d R.S. (2008); Miss. S.B. 2596, Leg., R.S. (2008); Mo. S.B. 1194, 94th Gen. Assembly, 2d R.S. (2008); Tenn. S.B. 0157, 105th Gen. Assembly, R.S. (2007-08).

nonhomicide crimes. *See* Meister, *Constitutionality of Child Rape Statutes*, 45 ARIZ. L. REV., at 210-12 (listing jurisdictions allowing the death penalty for nonhomicide crimes); *see also* DeathPenaltyInfo.org, Death Penalty for Offenses Other Than Murder, *at* http://www.deathpenaltyinfo.org/article.php?&did=2347 (last visited Mar. 1, 2008) (same).

Current nonhomicide crimes include: child rape,[2] treason,[3] aggravated kidnapping,[4] drug trafficking,[5] aircraft hijacking,[6] espionage,[7] aggravated assault by incarcerated, persistent felons, or murderers,[8] and

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2. GA. CODE ANN. §16-6-1(a)-(b); LA. REV. STAT. ANN. §14:42(D)(2); MONT. CODE ANN. §45-5-503(c); OKLA. STAT. tit. 10, §7115(I); S.C. CODE ANN. §16-3-655; TEX. PENAL CODE §12.42(c)(3). The Supreme Court of Georgia recently confirmed that GA. CODE ANN. §16-6-1 authorizes the death penalty for the crime of raping a child and that neither that court nor this Court's decision in *Coker* makes the imposition of the death penalty for nonhomicide child rape unconstitutional. *State* v. *Velazquez*, No. S07G1012, 2008 WL 480078, at *2 (Ga. Feb. 25, 2008).

Florida's capital "child-rape" statute, FLA. STAT. ANN. §794.011, is still on the books despite the Florida Supreme Court's decision in *Buford* v. *State*, 403 So.2d 943, 951 (Fla. 1981), declaring the law unconstitutional in light of *Coker*. The validity of Florida's law remains less than clear, however, because the death sentence of the offender in *Buford* was upheld on the grounds that the victim had been murdered, not on the grounds of the rape. *Id.*

3. 18 U.S.C. §2381; 720 ILL. COMP. STAT. ANN. 5/30-1; ARK. CODE ANN. §5-51-201; CAL. PENAL CODE §37; COLO. REV. STAT. ANN. §18-11-101; GA. CODE ANN. §16-11-1; LA. REV. STAT. ANN. §14:113; MISS. CODE ANN. §97-7-67; WASH. REV. CODE ANN. §9.82.010.

4. COLO. REV. STAT. ANN. §18-3-301; GA. CODE ANN. §§16-5-40(b), 17-10-30; IDAHO CODE §§18-4502, -4504; MONT. CODE ANN. §45-5-303.

5. 18 U.S.C. §3591(b); FLA. STAT. ANN. §§893.135, 921.142.

6. GA. CODE ANN. §16-5-44; MISS. CODE ANN. §97-25-55.

7. 18 U.S.C. §794; N.M. STAT. ANN. §20-12-42.

8. CAL. PENAL CODE §4500; MONT. CODE ANN. §46-18-220.

attempting, authorizing or advising the killing of any officer, juror, or witness in a case involving a continuing criminal enterprise, regardless of whether such killing actually occurs.[9]

Of these nonhomicide crimes, treason is perhaps the most unique and presents the best argument against reading the *Coker* plurality opinion as broadly as Petitioner and his *amici* do. Treason is the only crime defined in the text of the Constitution. U.S. CONST. art. III, §3. And the Constitution expressly confers on Congress the power "to declare the Punishment of Treason." *Id.* Under that authority, a congressional enactment authorizing the death sentence for treason has been in continuous effect since 1790. *See* 18 U.S.C. §2381. *See generally* James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99 (1983) (giving detailed history of the U.S. treason statute).

Treason is the gravest crime against the security of a nation. *See Stephan* v. *United States*, 133 F.3d 87, 90 (CA6 1943) ("Treason is the most serious offense that may be committed against the United States, and its gravity is emphasized by the fact that it is the only crime defined by the Constitution." [citations omitted]); WILLIAM BLACKSTONE, 4 COMMENTARIES *75 (calling treason "the highest civil crime"). And the Court has never ruled that the death penalty for treason is unconstitutional in a case not involving murder.

Given its "historical precedent and significant impact on society," it is doubtful that the plurality opinion in *Coker* meant to invalidate capital punishment for treason.

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9. 18 U.S.C. §3591(b)(2).

Charles C. Boettcher, Note, *Testing the Federal Death Penalty Act of 1994, 18 U.S.C. §§3591-98 (1994):* United States *v.* Jones, *132 F.3d 232 (5th Cir. 1998)*, 29 TEX. TECH L. REV. 1043, 1061 (1998); *see also* Ryan Norwood, Note, *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage*, 87 CORNELL L. REV. 820, 839 (2002) (recognizing treason as a still-viable capital crime). To believe otherwise, one must accept that the Court *sub silentio* set aside over 200 years of history in permitting the death sentence for treason, without even mentioning the treason statute. Such a reading goes too far, as does Petitioner's interpretation of *Coker*. Fairly read, *Coker* did not ban the death penalty in all nonhomicide cases.

III. THE COURT'S EIGHTH AMENDMENT JURISPRUDENCE PERMITS STATES TO IMPOSE THE DEATH PENALTY IN CASES OF AGGRAVATED CHILD RAPE.

Short of the absolute prohibition on executions that are inhumane or inflict "unnecessary pain," *see Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 464 (1947) (plurality opinion), the Eighth Amendment has been interpreted to prohibit only punishments that are *disproportionate* to the crime or are *excessive*. *See Atkins*, 536 U.S., at 311 n.7 ("[W]e have read the text of the Amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive."); *Weems* v. *United States*, 217 U.S. 349, 371 (1910) (stating that the Eighth Amendment is "directed '. . . against all punishments, which by their excessive length or severity, are greatly disproportioned to the offenses charged. . . .' 'The whole inhibition is against that which is excessive in . . . punishment inflicted.'") (quoting

O'Neil v. *Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)); *see also Roper*, 543 U.S., at 560 ("[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions."). This proportionality determination, in turn, considers "evolving standards of decency that mark the progress of a maturing society" in deciding a punishment's constitutionality. *Trop*, 356 U.S., at 101 (plurality opinion); *see also Atkins*, 536 U.S., at 324 (Rehnquist, J., dissenting); *Lockett* v. *Ohio*, 438 U.S. 586, 620 (1978) (Marshall, J., concurring); *Furman*, 408 U.S., at 242 (Douglas, J., concurring).

Assessing evolving standards of decency under proportionality review initially requires "objective evidence of the country's present judgment concerning the acceptability of death as a penalty for [the crime being tried]," *Coker*, 433 U.S., at 593 (plurality opinion); *Atkins*, 536 U.S., at 312, or, in other words, "sufficient evidence at present of a national consensus," *Roper*, 543 U.S., at 563. Objective indicia of society's standards may be found in legislative enactments, *see Roper*, 543 U.S., at 564-68; *Atkins*, 536 U.S., at 313-17; *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989); *Stanford*, 492 U.S., at 369-73, and the responses of juries in their sentencing decisions regarding the capital crime, *Enmund* v. *Florida*, 458 U.S. 782, 793-94 (1982); *Coker*, 433 U.S., at 596-97 (plurality opinion); *Gregg*, 428 U.S., at 181 (opinion of Stewart, Powell & Stevens, JJ.).

The inquiry into society's evolving standards of decency does not end with objective indicia of national consensus, *Roper*, 543 U.S., at 563; *Atkins*, 536 U.S., at 313, because "the Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under

the Eighth Amendment," *Coker*, 433 U.S., at 597 (plurality opinion). The objective data give the Court "essential instruction," but the Court still "must determine, in the exercise of [its] own independent judgment, whether the death penalty is a disproportionate punishment [for the crime being tried]." *Roper*, 543 U.S., at 564.

The Court's "independent" proportionality review asks whether there is any "reason to disagree with the judgment of 'the legislatures that have recently addressed the matter.'" *Atkins*, 536 U.S., at 321. This determination focuses on the defendant's culpability and whether the death penalty, when applied to those in the defendant's position, "measurably contributes" to one or both of the principal justifications for the death penalty—retribution and deterrence. *See Roper*, 543 U.S., at 568-75; *Atkins*, 536 U.S., at 318-19; *Tison* v. *Arizona*, 481 U.S. 137, 155-58 (1987); *Enmund*, 458 U.S., at 798; *Coker*, 433 U.S., at 597-99 (plurality opinion).

The Louisiana Supreme Court carefully applied the Court's two-part proportionality analysis in holding that Petitioner's death sentence was constitutional. *See Kennedy*, 957 So.2d, at 783-89. Regarding objective indicia of national consensus, the court examined legislative enactments of other States and found that 38 States allowed the death penalty, and five of those imposed the death sentence for child rape. *Id.*, at 785.

But the court did not limit its analysis to only those enactments involving child rape; the court also looked for an indication of national consensus by "consider[ing] all nonhomicide capital statutes to determine the national consensus for capital punishment in nonhomicide cases." *Id.* Under this metric, the court determined that 14 of the 38 States permitting capital punishment, as well as the

federal government, provide the death penalty for nonhomicide crimes. *Id.*, at 787-88. Accordingly, the court found that 38 percent of capital jurisdictions authorized some form of nonhomicide capital punishment. *Id.*, at 788.

Even more significant to the court, however, was the direction of change in the national consensus. *Id.* In *Atkins*, this Court noted that "[i]t is not so much the number of the[] States that is significant, but the consistency of the direction of change." 536 U.S., at 315; *see also Roper*, 543 U.S., at 565. Taking direction of change into account, the Louisiana Supreme Court found that "the number of jurisdictions allowing the death penalty for nonhomicide crimes more than doubled between 1993 and 1997." *Kennedy*, 957 So.2d, at 788. The court found it telling that "four states [had] enacted laws which capitalize[d] child rape since [1996]," and, what is more, that five states had capitalized child rape since *Coker* decided that the death penalty for rape of an adult woman was unconstitutional. *Id.*

After finding this objective evidence of national consensus, the court performed an independent proportionality analysis. *See id.*, at 788-89. The court noted this Court's characterization of "rape as a crime second to only homicide in the harm that it causes," *id.*, at 788 (citing *Coker*, 433 U.S., at 597), and speculated that "if the court is going to exercise its independent judgment to validate the death penalty for any nonhomicide crime, it is going to be child rape," *id.*

The Louisiana Supreme Court further observed that child rapists as a class of offenders possessed no characteristics that would tend to mitigate their moral culpability, and that the death sentence would serve the goals of deterrence and retribution just as well as does the

execution of first-degree murderers. *Id.*, at 789. The court observed that children are "particularly vulnerable" and in need of "special protection" by the State; that the degradation and devastation of child rape is felt by both the child and the community; that the physical, psychological, and emotional harm a child suffers at the hands of a rapist "leaves lasting scars" on the child and on "generations to come"; that child rape "undermines the community sense of security"; and that "[t]he physical trauma and indignities suffered by the young victim of this offense [are] of enormous magnitude." *Id.* Accordingly, the court held that "the death penalty for the rape of a child under twelve is not disproportionate." *Id.*

The *amici* States agree with the Louisiana Supreme Court's Eighth Amendment holdings and analysis. The Court should uphold the Louisiana Supreme Court's judgment and confirm that the death penalty may be constitutionally applied to the nonhomicide crime of aggravated child rape.

IV. PATRICK KENNEDY'S DEATH SENTENCE IS A PROPORTIONATE PUNISHMENT FOR HIS AGGRAVATED RAPE OF L.H.

A. Objective Indicia of National Consensus Supports Capital Punishment for Aggravated Child Rape.

The Louisiana Supreme Court accurately described the objective indicia of national consensus favoring the death penalty for child rape, specifically state legislative enactments regarding capital punishment for child rape and nonhomicide crimes. *See Kennedy*, 957 So.2d, at 784-88. Indeed, the legislative indicia are even stronger, because, after the Louisiana court ruled, the Texas statute

became effective. *Compare id.*, at 757 (decided May 22, 2007), *with* Jessica Lunsford Act, 80th Leg., R.S., ch.593, §4.02, 2007 Tex. Gen. Laws, at 1148 (effective Sept. 1, 2007). So, rather than there being five States allowing the death penalty for child rape, there are now six. *See supra* note 2, at 11.

Perhaps more important than simply the change in number from five to six States is "the consistency of the direction of change." *Atkins*, 536 U.S., at 315; *see also Roper*, 543 U.S., at 596-97 (same). As the Louisiana Supreme Court observed, since 1996 and post-*Coker*, five States "have capitalized child rape." *Kennedy*, 957 So.2d, at 788. Five states, the court noted, was a sufficient indicator of national consensus in favor of the death penalty for nonhomicide child rape because, in *Roper*, it took just five States abolishing the juvenile death penalty for this Court to find that society had turned its face against the juvenile death penalty. *Id.* Now, with Texas joining the fold, there is even stronger evidence of the consistency of the direction of change and a favorable national consensus towards capitalizing child rape.

The number of legislative enactments that permit the death sentence for child rape and the consistency of the direction of change is the best objective indicium to inform the Court's own independent proportionality analysis. "[L]egislation enacted by the country's legislatures," the Court has said, "[is] [t]he clearest and most reliable objective evidence of contemporary [societal] values." *Penry*, 492 U.S., at 331; *see also Roper*, 543 U.S., at 594 (O'Connor, J., dissenting); *Stanford*, 492 U.S., at 370; *Coker*, 433 U.S., at 594 (plurality opinion); *Gregg*, 428 U.S., at 175-76, 179 (opinion of Stewart, Powell & Stevens). Although jury sentencing decisions and

international opinion have also been cited as objective factors that may reflect national consensus, *see, e.g.*, *Enmund*, 458 U.S., at 788; *Coker*, 433 U.S., at 592 (plurality opinion), these indicia need not be examined to uphold capital statutes. *See, e.g.*, *Roper*, 543 U.S., at 564-68 (looking exclusively at state legislative enactments in invalidating imposition of death penalty on juveniles); *id.*, at 575 (looking to international opinion only for "confirmation" of the determination that the death penalty is disproportionate punishment for offenders under 18, and noting that international opinion was not "controlling"); *Atkins*, 536 U.S., at 313-17 (looking exclusively at state legislative enactments in invalidating imposition of death penalty on the mentally retarded); *Tison*, 481 U.S., at 152-55 (looking exclusively at state legislative enactments in upholding the imposition of death penalty on felony murderers whose participation in a crime evinced a reckless indifference to human life); *Enmund*, 458 U.S., at 796 n.22 (describing international opinion on the acceptability of a particular punishment as merely "an additional consideration which is 'not irrelevant'") (quoting *Coker*, 433 U.S., at 596 n.10); *Stanford*, 492 U.S., at 369 n.1 (emphasizing that "*American* conceptions of decency . . . are dispositive" [emphasis in original]). And, at least in the instant case, a jury of his peers unanimously agreed that Patrick Kennedy's crime merited the death penalty.

The relevant question is whether there is a compelling reason for the Court to disagree with the judgment of the State legislatures that have recently addressed this matter. *Enmund*, 458 U.S., at 801; *see Atkins*, 536 U.S., at 313 ("[I]n cases involving a consensus, our own judgment is 'brought to bear' . . . by asking whether there is reason to disagree with the judgment reached by the

citizenry and its legislators." [citation omitted]). To the contrary, the *amici* States submit that there are powerful independent reasons for the Court to agree with the legislative judgment on this issue.

B. Subjective Analysis Confirms That Patrick Kennedy's Death Sentence Is Proportionate Punishment for His Aggravated Rape of L.H.

Taking "essential instruction" from the objective indicia of the direction of state legislation, the Court should "exercise . . . [its] own judgment" to see whether it agrees with the State legislatures' judgment. *See Roper*, 543 U.S., at 564; *Atkins*, 536 U.S., at 313. The "underlying principle" that informs this inquiry is "that the death penalty is reserved for a narrow category of crimes and offenders." *Roper*, 543 U.S., at 568-69. The Court must look to see whether "the extreme culpability" of the offender makes him "deserving of execution," *id.*, at 568 (quoting *Atkins*, 536 U.S., at 319), and whether child rapists may "reliab[ly] be classified among the worst offenders," *id.*, at 569. A "critical facet" of the culpability determination "is the mental state with which the defendant commits the crime," either intent or "reckless indifference to the value of human life." *See Tison*, 481 U.S., at 157. Additional considerations include the injury to the public, *Coker*, 433 U.S., at 598 (plurality opinion), the severity and irrevocability of the injury to the victim, *id.*, and the brutality of the crime, *id.*, at 601 (Powell, J., concurring). In sum, the subjective proportionality inquiry examines the "heinous[ness]," *Roper*, 543 U.S., at 570, and "moral depravity" of the crime, *Enmund*, 458 U.S., at 823 (O'Connor, J., dissenting), and asks whether it "is evidence of irretrievably depraved character," *Roper*, 543 U.S., at 570, that warrants the death penalty.

1. Patrick Kennedy's aggravated rape of L.H. was morally depraved and allows him to be classified as among the worst type of criminal offenders.

Here, the facts reveal that Patrick Kennedy's rape of L.H., who was eight years old at the time, was so heinous that it marks him as among the worst type of criminal offenders, deserving of the death penalty. Kennedy was L.H.'s stepfather. *Kennedy*, 957 So.2d, at 760. L.H. was asleep in her bedroom when the rape began. *Id.*, at 768-69. She awoke to find Kennedy "on top of her" in her bed. *Id.* Kennedy covered L.H.'s eyes with his hand and continued to rape her. *Id.* Afterwards, Kennedy attempted to cover up the crime by destroying evidence, fabricating an alibi, implicating two innocent youths in the crime, and threatening L.H. "that she had better tell [the authorities] the story that he made up." *See id.*, at 761-71.

Kennedy's rape of L.H. was brutal. She sustained vaginal injury with profuse bleeding, as well as a tear of her entire perineum and prolapse of her rectum into her vagina. *Id.*, at 761. According to an expert in pediatric forensic medicine, her "injuries were the most serious he had seen, within his four years of practice, that resulted from a sexual assault." *Id.* Photographs of L.H.'s injuries showed "more severe injuries than are typically seen in a rape case," as well as "the extreme brutality of th[e] rape." *Id.*, appendix, at "Gruesome Photographs."

Aside from her physical injuries, L.H. also suffered evident psychological and emotional injuries. For a period after the rape, L.H. was separated from her mother and brother and placed in foster care, which "was upsetting to [L.H.]." *Id.*, at 771. Kennedy's threat that L.H. had better

tell the story that he made up created fear in L.H. and caused her psychological pain. She was "extremely reluctant" to tell the authorities the truth about her rape. *Id.*, at 765. L.H.'s participation in Kennedy's trial caused her to relieve her psychological torment. When called upon to testify at Kennedy's trial, L.H. "lost her composure," and, more than once while on the witness stand, she cried. *Id.*, at 767, 768.

During the sentencing phase of the trial, the jury heard evidence that Kennedy was a serial child rapist. On prior occasions, Kennedy had sexually abused another child, S.L., who was about eight or nine-years-old at the time. *Id.*, at 772. S.L. was the cousin and godchild of Kennedy's then-wife, C.S. *Id.* The sexual abuse occurred during the summer when S.L. was staying with Kennedy and C.S. *Id.* Kennedy sexually abused S.L. three times, the first time involved inappropriate touching and the last entailed sexual intercourse. *Id.*

These facts reveal Patrick Kennedy to be a morally depraved and highly culpable individual. The way in which Kennedy sexually violated his prepubescent stepdaughter demonstrates extreme culpability on his part. L.H. suffered such severe and painful physical injuries that surgery and other invasive medical procedures were required. The rape also inflicted painful emotional and psychological trauma on L.H. Kennedy's attempts to hide his crime and intimidate L.H. into misleading the authorities were also morally reprehensible and depraved. Plus, the evidence of Kennedy's previous predatory behavior involving the repeated sexual assault of another child about eight or nine years old marks him as among the worst offenders. In sum, the premeditation, furtiveness, brutality,

deceitfulness, and predatory recidivism of this crime shows that Kennedy is deserving of society's severest moral condemnation and, in the judgment of his peers, the death penalty.

2. Further evidence of the long-lasting and devastating effect on the victim of child rape and society show that capital punishment is appropriate.

The Court should also consider the lasting and devastating effects that child rape inevitably has on the victim and society. *Cf. Coker*, 433 U.S., at 597-98 & nn.11-12 (plurality opinion) (discussing findings of harm to rape victims and "public injury as well"); *also Roper*, 543 U.S., at 569-70 (referencing scientific and sociological studies on the comparative immaturity and irresponsibility of juveniles); *Atkins*, 536 U.S., at 318 & nn.23-24 (citing "abundant evidence" on the diminished cognitive capacities and impulsivity of the mentally retarded). Studies show that "child abuse and neglect have pervasive and long-lasting effects on children, their families, and the society." Ching-Tung Wang & John Holton, Prevent Child Abuse Am., Chicago, Ill., Total Estimated Cost of Child Abuse and Neglect in the United States, *at* http://www.preventchildabuse.org/about_us/media_releases/pcaa_pew_economic_impact_study_final.pdf [hereinafter Wang & Holton]. To get some sense of the magnitude of the problem of child abuse and neglect in the United States, it is estimated that the annual economic cost of child abuse and neglect in 2007 value is $103.8 billion. *Id.* In 2005, the U.S. government reported that "an estimated 899,000 children in the 50 States, the District of Columbia, and Puerto Rico were determined to be victims of abuse or neglect." U.S. Dep't of Health & Human

Servs., Admin. for Children & Families, Admin. on Children, Youth & Families, Children's Bureau, Child Maltreatment 2005, Summary, at xiv. Of these children, 9.3 percent suffered sexual abuse. *Id.*, at xv. And these are just the reported cases; it is widely recognized that incidents of child abuse are largely under-reported. *See, e.g.*, Advocates for Youth, Fact Sheet, *Child Sexual Abuse I: An Overview, at* http://www.advocatesforyouth.org/PUBLICATIONS/factsheet/fsabuse1.htm. (last visited Feb. 14, 2008) [hereinafter Advocates for Youth, Fact Sheet, *Child Sexual Abuse*]; Report of the Indep. Expert for the United Nations Study on Violence Against Children, U.N., Gen. Assembly, *Rights of the Child*, at 8 (Aug. 29, 2006).

The most vulnerable age group for child sexual abuse is children between ages 8 and 12. Advocates for Youth, Fact Sheet, *Child Sexual Abuse*. The average age for first abuse is 9.9 years for boys and 9.6 years for girls. *Id.* One study found that in over 20 percent of the cases of child sexual abuse, the victim was under 8 years of age. *Id.* And 24 percent of female child sexual abuse survivors were 5 years old or younger when they were first abused. *Id.*

Childhood "maltreatment" (which includes sexual, physical, and emotional abuse) "represents an *extreme traumatic insult* to the developing child." Dana M. Hagele, Commentary, *The Impact of Maltreatment on the Developing Child*, 66 N.C. MED. J. 356, 356 (2005) (emphasis in original). Indeed, the trauma is considered so severe that it is "comparable to that of military combat." *Id.*, at 357. Victims of child sexual abuse suffer adverse consequences in their physical, emotional, social, and cognitive development and "are more likely to experience adverse outcomes throughout their life span."

Wang & Holton. Victims of child abuse experience nearly twice the number of serious health problems as children without these problems. Hagele, *Impact of Maltreatment on the Developing Child*, 66 N.C. MED. J., at 357. Adverse outcomes of childhood sexual abuse may include:

- Poor physical health (*e.g.*, chronic fatigue, altered immune function, hypertension, sexually transmitted diseases, obesity);
- Poor emotional and mental health (*e.g.*, depression, anxiety, eating disorders, suicidal thoughts and attempts, post-traumatic stress disorder);
- Social difficulties (*e.g.*, insecure attachments with caregivers, which may lead to difficulties in developing trusting relationships with peers and adults later in life);
- Cognitive dysfunction (*e.g.*, deficits in attention, abstract reasoning, language development, and problem-solving skills, which ultimately affect academic achievement and school performance);
- High-risk health behaviors (*e.g.*, higher number of lifetime sexual partners, younger age at first voluntary intercourse, teen pregnancy, alcohol, and substance abuse); and
- Behavioral problems (*e.g.*, aggression, juvenile delinquency, adult criminality, abusive, or violent behavior).

Wang & Holton; Hagele, *Impact of Maltreatment on the Developing Child*, 66 N.C. MED. J., at 357-58; Amy Naugle, Nat'l Violence Against Women Prevention Ctr., Med. Univ. of S.C., Child Sexual Abuse Fact Sheet, http://www.nvaw.org/research/factsheet.shtml (last visited Feb. 14,

2008); Paul E. Mullen & Jillian Fleming, Nat'l Child Protection Clearinghouse, Issues in Child Abuse Prevention, vol. 9, Autumn 1998, *Long-Term Effects of Child Sexual Abuse*, http://www.aifs.gov.au/nch/pubs/issues/issues9/issues9.html (last visited Feb. 14, 2008).

As for the impact on society, child sexual abuse is similarly drastic. Child sexual abuse has been correlated with an increased prevalence of public-health problems, which, in turn, have been correlated with increased public utilization of public and private resources. Hagele, *Impact of Maltreatment on the Developing Child*, 66 N.C. MED. J., at 357. The evidence further suggests that child abuse is a frequent precursor to adult criminality. Patrick F. Fagan & Dorothy B. Hanks, Heritage Found., Backgrounder No. 1115, *The Child Abuse Crisis: The Distintegration of Marriage, Family, and the American Community*, at 6 (May 15, 1997), *available at* http://www.heritage.org/Research/Family/BG1115.cfm. "Child sexual abuse also can play a major role in shaping the future sex criminal" and "sexual revictimization" of the victim. *Id.*, at 22, 23.

3. The penological justifications for the death penalty are fully satisfied.

Finally, consideration must be given to "the penological justifications for the death penalty." *Roper*, 543 U.S., at 571. The "two distinct social purposes served by the death penalty" are "'retribution and deterrence of capital crimes by prospective offenders.'" *Atkins*, 536 U.S., at 319 (quoting *Gregg*, 428 U.S., at 183 (opinion of Stewart, Powell & Stevens, JJ.)). Both of these factors weigh in favor of imposing the death penalty on Petitioner. As the Louisiana Supreme Court correctly observed, the imposition of capital punishment for aggravated child rape

"will serve the goals of deterrence and retribution just as well as execution of first-degree murderers would." *Kennedy*, 957 So. 2d, at 789.

Consistent with the modern trend among the States—and with the growing scientific understanding of the unique and irreparable harms of child rape—the Louisiana Legislature reasonably determined that the death penalty is an appropriate and proportionate punishment for the crime of aggravated child rape. A jury of Patrick Kennedy's peers unanimously agreed. Nothing in the Constitution prohibits that eminently reasonable determination.

CONCLUSION

The Court should affirm the judgment of the Louisiana Supreme Court.

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PATRICK KENNEDY,
Petitioner,

v.

LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR REHEARING

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PETITION FOR REHEARING

The State of Louisiana respectfully petitions for rehearing of the Court's June 25, 2008 decision. Specifically, it asks for an order (1) granting rehearing and (2) setting the case for reargument.

Because Sup. Ct. R. 29.4(b) and 28 U.S.C. § 2403(a) may apply, the Solicitor General of the United States has been served with this Petition.

GROUNDS FOR REHEARING

Although this Court almost never grants petitions for rehearing, this case meets the rare exception contemplated by Sup. Ct. R. 44.1 and articulated in *Ambler* v. *Whipple*, 90 U.S. 278, 282 (1875): If "the omissions in the transcript on which the case was heard are material to the decision of the case, it presents a strong appeal for reargument."[1]

Section 552(b) of the National Defense Authorization Act, Pub. L. No. 109-163, 119 Stat. 3136, 3263 (2006), specifies maximum sentences: "For an offense under subsection (a) (rape) or subsection (b) (rape of a child), death or such other punishment as a court-martial may direct."

Before this provision, child rape was subsumed under the Uniform Code of Military Justice ("UCMJ") definition of rape ("an act of sexual intercourse, by force and without consent"[2]), a charge punishable by

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[1] See, *e.g.*, *Reid* v. *Covert*, 351 U.S. 487 (1956), *reh'g granted*, 352 U.S. 901 (1956), *aff'd on reh'g*, 354 U.S. 1 (1957); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271 (1949), *reh'g granted*, 337 U.S. 910 (1949), *aff'd on reh'g*, 339 U.S. 605 (1950).

[2] 10 U.S.C. § 920(a) (2006).

death at least since the 1863 Army Articles of War.[3] The 1950 UCMJ reaffirmed the availability of the death penalty for certain nonhomicide offenses—including rape—and extended military law to apply during peacetime.

In 2006, Congress separated the rape provision into several subsections (aggravated sexual assault, child rape, etc.), and explicitly subjected child rape to the death penalty. The House of Representatives voted 374-41 to pass this law. 151 Cong. Rec. H12242 (Dec. 18, 2005). The Senate approved it by voice vote. 151 Cong. Rec. S14275 (Dec. 21, 2005).

This change in law was deliberate and premeditated. The Department of Defense prepared a comprehensive report recommending changes to the UCMJ that examined the death penalty for child rape. Dept. of Defense, *Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice*, at 72-76, 301, *available at* http://www.dod.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc. The report discussed Louisiana's child rape law and attached Louisiana's statute as an appendix. *Id.* at 75, 599-602. When DOD submitted its proposed changes to Congress, it highlighted the capital child-rape provision. See Dept. of Defense, *Proposed Amendments to the UCMJ*, 17, 21, *available at* http://www.dod.mil/dodgc/php/docs/HASCMeeting42105.pdf.

After Congress adopted the DOD recommendations, the President signed Executive Order 13,447,

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[3] 1863 Army Articles of War, ch. 75, 12 Stat. 731, 736 (1863). Military law did not extend to peacetime domestic offenses until 1950. Compare 1916 Army Articles of War, 39 Stat. 619, 664 with UCMJ, 64 Stat. 107, 140 (1950).

which specifically implemented the child-rape capital provision. 72 Fed. Reg. 56,179 (Sept. 28, 2007). Now, Rule for Courts-Martial 1004(c)(9) (2008) and Manual for Courts-Martial, Part IV, Paragraph 45 (2008), directly allow for the death penalty for child rape.[4]

Thus, both political branches have recently and affirmatively authorized the death penalty for child rape. Such a clear expression of democratic will, at the very least, calls into question the conclusion that there is a "national consensus against" the practice. *Kennedy* v. *Louisiana*, No. 07-343, slip op. 23 (June 25, 2008).

Respondent regrettably did not know of this Federal provision. This was a significant error, for which Respondent accepts full responsibility. Respondent first became aware of Section 552(b) from a legal "blog" that attracted subsequent commentary.[5]

Respondent's mistake, however, should neither inhibit the Court's work nor diminish its fealty to the Constitution. Section 552(b) is directly relevant, if not essential, to the Questions Presented. And the Court's opinion answering those questions is factually erroneous without reference to it. Absent

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[4] Exec. Order No. 12,460, 49 Fed. Reg. 3,169 (1984), "amended the Manual for Courts-Martial to provide a new procedure for capital cases." *United States* v. *Curtis*, 32 M.J. 252, 257 (C.M.A. 1991). This new procedure, set forth in R.C.M. 1004, and upheld in *Loving* v. *United States*, 517 U.S. 748 (1996), requires courts-martial to unanimously find at least one aggravating factor before imposing death. One of these factors, R.C.M. 1004(c)(9)(A), specifically authorized the death penalty for the rape of a child under the age of 12. It has remained unchanged since its inception in 1984.

[5] See posting of CAAFlog to CAAFlog, http://caaflog.blogspot.com/ (June 28, 2008, 18:25 EDT).

rehearing, a federal law may be invalidated without argument and briefing. The State of Louisiana therefore respectfully, and humbly, submits that rehearing is warranted.

I. REHEARING IS WARRANTED IN LIGHT OF THE FACT THAT CONGRESS RECENTLY AUTHORIZED THE DEATH PENALTY FOR THE RAPE OF A CHILD

This Court's decision was grounded in two rationales: (1) "a national consensus against capital punishment for the crime of child rape," slip op. 23; and (2) this Court's "independent judgment, that the death penalty is not a proportional punishment for the rape of a child." Slip op. 35.

The decision did not quantify which factor, if any, predominated, instead stating that the first one was "entitled to great weight." Slip op. 23. If, as the State of Louisiana believes, Section 552(b) calls into question the national consensus found by this Court, the question arises whether the second factor, standing alone, justifies an Eighth Amendment holding that supplants the will of not only the several States, but of the Federal Government as well.

Furthermore, the existence of Section 552(b) may require this Court to examine whether the two factors are hermetically sealed. The Court may well decide that what is disproportional is a function, at least in part, of what is recently authorized by legislatures. Because this Court was not presented with all of the evidence of recent legislative enactments, its "independent judgment" was not fully informed.

In any event, were this Court to rest its decision more heavily on disproportionality, the opinion may need to be modified with respect to both Questions Presented. For example, this Court held that "the death penalty should not be expanded to instances where the victim's life was not taken." Slip op. 26-27. But under a proportionality analysis, there may well be nonhomicide crimes so heinous that the death penalty is an appropriate response. Cf. Dissent slip op. 1 (Alito, J., dissenting) (specifying some possible circumstances). This Court did not have occasion to examine the myriad circumstances relevant to a proportionality calculation because it found a national consensus against the death penalty for all forms of child rape. But if that social consensus is more textured as a result of the Federal statute, a more finely grained proportionality analysis would be required.

A. Section 552(b) Calls into Question this Court's Conclusion that There Is a "National Consensus" Against the Death Penalty for Child Rape

This Court found that six states authorized the death penalty for child rape. Slip op. 12. It then observed:

> By contrast, 44 States have not made child rape a capital offense. As for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse. See 108 Stat. 1972 (codified as amended in scattered sections of 18 U. S. C.). Under 18 U. S. C. §2245, an

> offender is death eligible only when the sexual abuse or exploitation results in the victim's death.

Id. at 12-13.

The Majority comprehensively analyzed whether Georgia and Florida had authorized the punishment. *Id.* at 13-14. It then concluded: "Thirty-seven jurisdictions—36 States plus the Federal Government—have the death penalty" but "only six of those jurisdictions authorize the death penalty for rape of a child." *Id.* at 15.

Justice Alito, joined by the Chief Justice, Justice Scalia, and Justice Thomas, dissented: "The Court notes that Congress has not enacted a law permitting the death penalty for the rape of a child . . . ." Dissent slip op. 13. He continued, "Congress' failure to enact a death penalty statute for this tiny set of cases is hardly evidence of Congress' assessment of our society's values." *Id.*

Section 552(b) calls the above analysis into question, and demonstrates that the Court's decision supplants not only the will of the States, but that of the Federal Government. While Congress has not, as yet, applied the death penalty to child rape in the civilian context, the recent trend (not to mention the general parity between military and civilian law today) indicates that it very well may do so, if given the opportunity.

That the Federal legislation, like the State enactments, is of recent vintage underscores that the national consensus is evolving.[6] Just over a decade

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[6] Recent polls suggest, if anything, the national consensus favors Louisiana's law. *E.g.*, Quinnipiac Univ. Polling Inst.,

ago, no State nor the Federal Government had a specific statute permitting the death penalty for child rape. Since that time, Louisiana enacted its law (1995), followed by Georgia (1999), Montana (1997), Oklahoma (2006), South Carolina (2006), Texas (2007), slip op. 12, and the Federal court-martial system (2006). This *authorizing* trend is just as much part of the "evolving standards of decency" as are practices that *restrict* particular punishments.[7] In just fourteen years, America has decided democratically that jurisdictions governing nearly 50 million of her people may subject child rapists to the death penalty:

Americans Oppose Same-Sex Marriage (July 17, 2008) (finding that 55% favor the death penalty for child rape and 38% oppose), *available at* http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194.

[7] To be sure, no one has been executed in recent years for the crime of child rape. But by the same token, "[n]obody has been executed for treason since John Brown in 1859." James Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. Pitt. L. Rev. 99, 156 (1983). That fact was not relevant to the Court's suggestion that treason is constitutionally punishable by death. Slip op. 26.

Year	Total Population Impacted By Death Penalty Statutes for Child Rape	States Punishing Child Rape with the Death Penalty
1994	0	0
1995	4,378,779	Louisiana[8]
2005	14,539,173	Louisiana,[9] Georgia,[10] Montana[11]
2007	48,099,420	Louisiana,[12] Georgia,[13] Montana,[14] Oklahoma,[15] South Carolina,[16] Texas,[17] Armed Forces[18]

[8] U.S. Census Bureau, *Time Series of Louisiana Intercensal Population Estimates by County: April 1, 1990 to April 1, 2000* (2002), *available at* http://www.census.gov/popest/archives/2000s/vintage_2001/CO-EST2001-12/CO-EST2001-12-22.html.

[9] Louisiana population in 2005 was 4,495,670. U.S. Census Bureau, *Annual Estimates of the Populations of the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2007* (2007), *available at* http://www.census.gov/popest/states/NST-ann-est.html.

[10] Georgia population in 2005 was 9,107,719. *Id.*

[11] Montana population in 2005 was 935,784. *Id.*

[12] Louisiana population in 2007 was 4,293,204. *Id.*

[13] Georgia population in 2007 was 9,544,750. *Id.*

[14] Montana population in 2007 was 957,861. *Id.*

[15] Oklahoma population in 2007 was 3,617,316. *Id.*

[16] South Carolina population in 2007 was 4,407,709. *Id.*

[17] Texas population in 2007 was 23,904,380. *Id.*

[18] There were 1,374,200 active-duty members in 2007. Office of Mgmt. & Budget, *Budget of the United States Government,*

Whatever may be said about State legislative trends, Congress and the President, representing all citizens and States of the Union, have decided that child rape is subject to capital punishment. At the very least, any conclusion that a prohibitory national consensus exists must overcome the burden of showing that there exists a better way to decide democratically than that embodied in Article I, section 7 of our Constitution. Such a showing is possible, if at all, only with reargument.

B. This Court's Decisions Examining Whether Particular Death Penalty Practices Violate the Eighth Amendment Have Consistently Examined Federal Practice

This Court has consistently examined federal law when evaluating the "evolving standards of decency." For example, *Woodson* v. *North Carolina*, 428 U.S. 280, 291 (1976), examined national legislative trends on mandatory sentencing, and specifically noted that the "Federal Government had made death sentences discretionary for first-degree murder . . . ." Likewise, *Payne* v. *Tennessee*, 501 U.S. 808, 820 (1991), looked to the Federal Sentencing Guidelines to determine whether the Eighth Amendment prohibited victim-impact evidence. Later, *Roper* v. *Simmons*, 543 U.S. 551, 567 (2005), examined the Federal Death Penalty Act of 1994 regarding juveniles. More recently, *Baze* v. *Rees*, 128 S. Ct. 1520, 1527 (2008), surveyed both

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Fiscal Year 2008, DOD Military Personnel Active and Reserve Forces, available at http://www.whitehouse.gov/omb/budget/fy2008/pdf/appendix/mil.pdf. This number is conservative, since the UCMJ applies to far more than simply active-duty personnel. 10 U.S.C. § 802 (2006).

state and federal law when evaluating the constitutionality of lethal injection.

Section 552(b) also reveals why this case does not have a "close[] resemblance" to *Enmund* v. *Florida*, 458 U.S. 782 (1982). Slip op. 22. In *Enmund*, the Federal statute, along with Colorado's, "*preclude[d]* the death penalty" under the circumstances of that case, 458 U.S. at 791 (emphasis added), whereas Section 552(b) *authorizes* the death penalty for child rape.

The better analogy is therefore *Tison* v. *Arizona*, 481 U.S. 137, 158 (1987), which limited *Enmund* by permitting the death penalty for felony-murder where the nonhomicide offense was committed with "reckless indifference to human life." In so deciding, the Court specifically cited Federal law authorizing such penalties. *Id.* at 153-54. ("Two jurisdictions require that the defendant's participation be substantial").

C. Military Law Is Deeply Relevant to Interpretation of the Eighth Amendment

This Court has looked to military law to interpret the Eighth Amendment since at least 1879. *Wilkerson* v. *Utah*, 99 U.S. 130, 133-35 (1879), contained an extensive discussion of military practice, citing not only the Articles of War but also military treatises. That discussion led the Court to conclude that "the authorities referred to are quite sufficient to show that the punishment of shooting" did not violate "the eighth amendment." *Id.* at 134-35. Later, *Furman* v. *Georgia*, 408 U.S. 238, 275 (1972) (Brennan, J., concurring), referred to the practice of "review[ing] various treatises on military law" when seeking societal trends.

While not an Eighth Amendment case, *Loving*, *supra*, upheld the President's constitutional authority to specify aggravating factors. Those factors permitted the death penalty for rape when the victim was under the age of 12. R.C.M. 1004(c)(9). R.C.M. 1004 "was drafted in an effort to accommodate" *Coker* v. *Georgia*, 433 U.S. 584 (1977). *United States* v. *Straight*, 42 M.J. 244, 247 (C.A.A.F. 1995). The current Manual for Courts-Martial similarly acknowledges that *Coker* "leaves open the question of whether it is permissible to impose the death penalty for the rape of a minor by an adult." M.C.M., A23-14.

Congress, apparently aware that this Court upheld the military capital sentencing regime, determined that death sentences were constitutionally appropriate for child rape. Accordingly, in 2006, it stated a national commitment to this belief in Section 552(b).

II. REHEARING IS APPROPRIATE EVEN IF OTHER GROUNDS SUFFICE TO JUSTIFY THE COURT'S CLOSELY-CONTESTED DISPOSITION

The State of Louisiana does not doubt that it is possible, even with the existence of Section 552(b), for this Court to reach the same disposition on rehearing as it did on June 25. But that is not the test.[19] Rather, rehearing is warranted where, as here, substantial grounds not previously presented exist.

This test serves several important goals. It protects the public's trust that the Court has before it all relevant information before reaching a final decision.

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[19] The Court has granted rehearing petitions after a decision on the merits on at least 22 occasions. Eugene Gressman *et al.*, *Supreme Court Practice* 815-18 (9th ed. 2007).

It also safeguards the perception of fairness, underscoring that the Court's decisions in momentous cases will not be finalized for technical and procedural niceties. Substantively, it ensures that the Court's final decision accurately reflects the state of facts and the law, permitting its Members to grapple with new evidence and its implications for the rationales underlying their decision. And it ensures that the Court hear from the Federal Government before its law is set aside by this Court.

Indeed, if a majority of this Court believes that the second factor (its independent judgment) alone justified the decision, that view would militate for, not against, rehearing. This Court would then be subordinating, perhaps for the first time, the "national consensus" factor to the Court's independent judgment. Such a rule would have tremendous implications for state and federal punishment regimes. Rehearing ensures that, before this Court follows this path, it has before it a fully developed factual and legal record in a concrete case.

Furthermore, rehearing would promote the guidance function of this Court. Legislatures could then create punishment systems in light of this Court's new pronouncement about this second factor.

If, conversely, this Court were to deny rehearing, it would sow confusion about the proper weighting of the "national consensus" and "independent judgment" factors. It would create doubt about whether recent legislative acts can ever inform this Court's "independent judgment." And denial would cast uncertainty over military law's relevance to the Eighth Amendment.

Rehearing, moreover, would inform consideration of the second Question Presented. Recent legislative

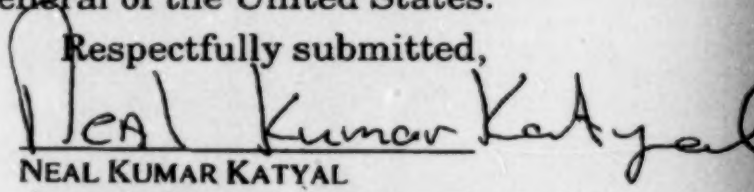
action is relevant in assessing whether a specific statute's narrowing provisions offend a national consensus or are a disproportionate response.

Finally, the Court's June 25 decision invalidates a federal statute without argument. There is no obvious way to read the decision that maintains Section 552(b). Military courts, for example, have applied *Coker* without entertaining any notion that courts-martial are exempt from this Court's Eighth Amendment pronouncements regarding civilians. See *United States* v. *Clark*, 18 M.J. 775, 776 (N-M.C.M.R. 1984). This Court has not hesitated to hear from the United States before one of its laws is set aside, and should not do so now.

CONCLUSION

Accordingly, this Petition should be granted. Alternatively, the Court may wish to first seek the views of the Solicitor General of the United States.

Respectfully submitted,



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